No. 91-1929

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SABINE RIVER AUTHORITY, *et al.*
Petitioners,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the taking by a federal agency of a conservation easement that forecloses in perpetuity the use of land for any purpose inconsistent with its terms, but which nevertheless may have a significant adverse effect on the quality of the human environment, is a federal action exempt from the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), simply because it preserves the existing physical characteristics of the land.

PARTIES IN THE COURT BELOW

Petitioner is the Sabine River Authority ("Petitioner" or the "Authority"), an instrumentality of the State of Texas charged by the Texas legislature with responsibility, *inter alia*, for water supply and conservation. Respondents are the United States Department of Interior and the United States Fish and Wildlife Service (the "FWS"). In addition, the following parties intervened in the proceedings before the district court: Texas Water Conservation Association ("TWCA"), which intervened to support Petitioner's argument regarding the need for an Environmental Impact Statement ("EIS") to cover the easement acquisition in this case and to argue its interests in having FWS prepare a programmatic EIS for its Texas Bottomland Hardwoods Preservation Program; and the Sierra Club and the National Audubon Society each of which intervened to support FWS's Finding of No Significant Impact ("FONSI") in connection with the easement acquisition challenged here.

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PETITION FOR A WRIT OF CERTIORARI

The Sabine River Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 951 F.2d 669 (5th Cir. 1992) and is reproduced in Appendix A, *infra*. The opinion of the district court is reported at 745 F. Supp. 388 (E.D.Tex. 1990) and is reproduced in Appendix B, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. On February 11, 1992,

Petitioner-Intervenor, Texas Water Conservation Association ("TWCA"), filed a timely petition to the court of appeals for a panel rehearing. That petition was denied by the court of appeals by order dated March 4, 1992, reproduced in Appendix C, *infra*. Pursuant to Sup. Ct. Rule 13, the time for filing this petition for writ of certiorari runs to and including June 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Sections 2, 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4331 and 4332, reproduced in Appendix D, *infra*.

STATEMENT OF THE CASE

Fortunately, most people are able to take an adequate supply of clean drinking water for granted. This is due in large part, to the planning and conservation efforts of state and local water districts or authorities. Water authorities, such as Petitioner, administer a complex process of conserving, purifying, piping and delivering potable water to homes, farms and businesses across this nation. As a result, in most instances, citizens of this country can turn on a faucet without regard to the vital and sophisticated process involved in sustaining safe and adequate water in the human environment.

Although modern technology has been brought to bear on the water supply process, the availability of adequate and safe water is still very dependent on the forces of nature. As graphically illustrated by events in southern California over the last eighteen months, a natural drought can debilitate the environment, for humans and wildlife alike. Through a so-

phisticated study of available supply, climate, geography and population, water authorities project the need for water and decide the best means to satisfy it.

As the result of such studies, in the spring of 1985 the Authority announced its preliminary decision to construct the Waters Bluff Reservoir ("Waters Bluff") along the Sabine River in Smith, Upshur and Wood Counties, Texas, to assure an adequate and safe supply of water in east Texas. Waters Bluff would entail the inundation of portions of the Little Sandy Hunting and Fishing Club (the "Club"), a private club serving the recreational needs of a small and exclusive membership. After the Authority announced its intentions, FWS, in coordination with the Club and with little regard for the Authority's studies in support of Waters Bluff, took a conservation easement over the Club lands and deposited the land in the National Wildlife Refuge System. FWS's action precluded the Authority, as an agency of the State of Texas, from using the site to meet anticipated water supply needs and safeguarded the Club lands for the continued exclusive use of its members.

FWS prepared an environmental assessment ("EA") in connection with the acquisition of the Club easement. The EA's cursory and result-oriented review of water supply reflected the agency's inexperience in water supply planning. Experts in water issues within the Department of Interior, however, had a deeper respect for the vital importance of water supply planning and voiced concern that the easement acquisition might jeopardize the future supply of water in the environment. These experts strongly objected to acquisition of the Club easement without the benefit of

an Environmental Impact Statement ("EIS") to address water supply and concluded that the EA was "a biased document frequently lacking in data and evidence but rich in negatives and superlatives." (*See* App. E, Letter From Bureau of Reclamation, Chief of the Environmental Branch to FWS, Regional Planning Officer). FWS was indifferent to the concerns raised by these experts. Consumed by its objective to preserve the Club property, FWS dedicated much of the EA to a discussion of how Waters Bluff would injure migratory bird habitat. Yet, the EA should have addressed how the *agency's* action would impact water supply, not how Petitioner's proposed development of Waters Bluff would impact migratory bird habitat. The limited discussion of water supply issues that did appear in the EA was fraught with factual errors, all of which were fully discussed in Petitioner's briefs below.

Accordingly, the Authority brought suit to challenge FWS's easement acquisition under NEPA claiming that the agency should have prepared an EIS to consider the effect of its action on water supply for the residents of Texas. The jurisdiction of the district court over the Authority's NEPA claims was premised on 28 U.S.C. §§ 1331 and 1361 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. At the close of discovery, both the Authority and FWS moved for summary judgment.

The district court, sharing FWS's disregard for water supply, affirmed the agency's FONSI. Water was discounted so drastically by the district court that it was no longer even regarded as an environmental issue within the "zone of interests" protected by NEPA. (*See* App. B at 39a (Authority's claims "contrary to purposes of NEPA" and "not within NEPA's

scope")). This predisposition heavily influenced the district court, causing it to overlook the errors and inadequacies of FWS's EA pointed out by the Authority. As far as the court was concerned, FWS's preparation of an EA was gratuitous because the court determined that the Authority's water supply interests were contrary to, and unprotected by, NEPA in the first instance. (*See, e.g.*, App. B at 48a-49a (FWS failure to consider controversial, precedential and cumulative effects of action excused because FWS's action beyond scope of NEPA anyhow)). The district court so undermined the nature of the Authority's interest in water supply that the Authority was even denied standing to assert a claim under NEPA.

The Fifth Circuit Court of Appeals, unable to accept that the supply of water, a life-sustaining element critical to the human environment, was not protected by NEPA, reversed the decision of the district court on standing, stating:

> the injuries alleged by the plaintiffs in their complaints - harmful effects on the quality and quantity of East Texas' water supply - "are among the *sorts* of interests" that NEPA was specifically designed to protect.

(App. A at 11a (emphasis in original), *citing, Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 3187 (1990)).

Although recognizing that water supply was a protected interest under NEPA, the court of appeals agreed with the district court that the acquisition of a non-development easement, which does not alter the physical environment cannot amount to a "major fed-

eral action [ ] significantly affecting the quality of the human environment." (App. A at 20a (citations omitted)). Thus, the court of appeals upheld the district court's grant of summary judgment in favor of FWS.

TEXT: REASONS FOR GRANTING THE PETITION

I. *Introduction*

The writ of certiorari should be granted to reverse the decision of the court of appeals which creates an unprecedented blanket exemption from NEPA's mandate that every federal agency conduct an EIS when a proposed major federal action "may significantly affect the quality of the human environment." NEPA § 102(C), 42 U.S.C § 4332(C). By removing from NEPA's purview federal actions that preserve the existing physical environment, the lower court has given the federal government *carte blanche* to acquire lands and dedicate natural resources to preservation uses without having to consider whether such action may adversely affect the human environment.[1]

As discussed fully below, the exemption created below is imbued with important policy implications and:

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[1] By concluding that preservation actions that cause no site-specific threshold change in the physical environment, never significantly affect the quality of the human environment for purposes of NEPA, the lower courts have categorically excluded these actions from the reach of NEPA. (App. A at 20a). This holding functions as a pre-prepared FONSI for all future preservation actions of the type at issue here. Because the purpose of an EA is to determine whether to prepare an EIS or instead issue a FONSI, 40 C.F.R. § 1508.9 (1), it is axiomatic that the ruling below obviates the need for federal agencies to prepare even an EA before dedicating natural resources to preservation purposes.

(1) infuses a substantive bias in favor of preservation actions into NEPA which cannot be reconciled with the "outcome neutral" application of the statute contemplated by *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989);

(2) will exclude from NEPA preservation actions, notwithstanding that such actions may adversely affect national water supply planning; and

(3) rests on a misapplication of this Court's ruling in *Metropolitan Edison Co. v. People against Nuclear Energy*, 460 U.S. 766 (1983).

II. *The Elevation of Preservation Interests To The Exclusion Of Water Supply (And Other) Environmental Interests Violates The "Outcome Neutral" Analysis Required by Methow Valley*

The lower court's holding turns on a substantive bias in favor of FWS's preservation goals that cannot be reconciled with this Court's ruling in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). In *Methow Valley*, this Court explicitly restated the well-established principle that NEPA itself does not impose substantive standards mandating particular results, but simply prescribes the necessary process for preventing uninformed, rather than unwise, agency action. *Id.*, 490 U.S. at 351, *citing*, *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980)(*per curiam*); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

The decision below treats the objectives of preservation and those of NEPA as coextensive and interchangeable. This assertion, however, plainly misstates the law of NEPA. Simply stated, NEPA is not a preservation statute. *Methow Valley*, 490 U.S. at 351, n. 14. Nor does NEPA have as its purpose the protection of endangered species or the creation of refuges. These objectives are substantive goals to be pursued at the agency's discretion after complying with NEPA's procedural dictates.

The procedural sufficiency of FWS's NEPA review escaped scrutiny in this case because the lower courts embraced FWS's preservation agenda as an embodiment of NEPA's goals. The courts' affirmance of FWS's FONSI turned on their approval of the character of the federal action in question - namely, the preservation of migratory bird habitat. The court of appeals claims "[t]his case is for the birds - thousands of them." (App. A at 3a). Quite to the contrary, the legal issue to which judicial review is confined in this case has nothing to do with birds, or for that matter other forms of wildlife, wetlands or old growth timber. While the court may have found FWS's efforts to preserve these assets "laudatory," (App. A at 5a), the positive attributes of FWS's action have no relevance to whether an EIS is required to examine the effect of FWS's action on water supply. The need for an EIS cannot be excused merely because a court, in its judgment, finds the action as a whole is environmentally beneficial. *See* 40 C.F.R. § 1508.27(b)(1) (significant adverse effect may exist even if agency believes net effect will be beneficial).[2]

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[2] As stated in *Jones v. Gordon*, 621 F. Supp. 7 (D. Alaska

A reviewing court cannot set aside a procedurally sufficient decision "simply because the court is unhappy with the result reached." *Vermont Yankee*, 435 U.S. at 558. The corollary question raised by this case is whether a court can uphold a procedurally deficient agency decision because it is pleased with the result reached. The court of appeals has done just this. According to the decision below FWS's procedures under NEPA need not be scrutinized because where "land is earmarked as a wildlife habitat and migratory bird refuge . . . this intended 'use'. . . has no significant environmental impact." (App. A, at 22a). By infusing into NEPA preservation goals, the decision below is incongruous with the "outcome neutral" analysis mandated by *Methow Valley*.

III. *The Decision Below Will Exclude From NEPA Actions That Adversely Affect The Quality And Supply Of Water*

The interests of water supply and those of migratory bird habitat often compete for the same natural resources - non-coastal wetlands. A balanced human environment requires an orderly allocation of these finite natural resources between wildlife and water

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1985), *aff'd in part and rev'd in part*, 792 F.2d 821 (9th Cir. 1986):

> The mere fact that an agency has been given the role of implementing an environmental statute is insufficient to [excuse the agency from NEPA compliance] . . . . [To do so in] all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations.

Id. at 13.

supply.[3] If properly employed, NEPA provides a process to ensure this objective.

Not only is water a vital component of the environment protected by NEPA, "[w]ater is a necessity of life. It is a valuable resource which must be protected and conserved and shared by all." *North Carolina v. Hudson*, 731 F. Supp. 1261, 1273 (E.D.N.C. 1990)(upholding FONSI for project entailing withdrawal of water from lake for municipal water supply), *aff'd sub. nom.*, *Roanoke River Basin Ass'n. v. Hudson*, 940 F.2d 58 (4th Cir. 1991). For this reason, "even marginal degradation of drinking water is environmentally significant . . .." *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 353 (S.D.N.Y. 1991). At issue here is one natural resource targeted by two competing users, both advancing legitimate, albeit conflicting, environmental agendas. NEPA must be applied even-handedly to require that both interests acknowledge the effects of their actions on the other competing environmental interest.

If permitted to stand, the court of appeals' decision will directly and adversely affect national water supply planning.[4] The record below is clear that of the

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[3] Potential reservoir sites are limited. Reservoir water storage is feasible only where the geographic contours of the land permit. The site must be free from pre-existing building and other structures. Water must be stored in reasonable proximity to its intended users. Considering these limitations, it becomes evident that water authorities and preservation groups compete for use of the same natural resources.

[4] The Authority supports and endorses the Petition for Writ of Certiorari filed in this case by the Texas Water Conservation Association which seeks *inter alia* a programmatic EIS to address the effects of FWS's Texas Bottomland Hardwood Pres-

62 sites in Texas targeted for preservation by FWS, 27 conflict with identified potential reservoir sites. (Record Vol. 3, 59 at 6). The situation in Texas is likely representative of the scope of the conflict on a national scale. Indeed, the conflict between preservation and water supply will undoubtedly be intensified in areas where water planning is even more critical to maintaining the quality of human environment. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976)("It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water."); *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 850 (9th Cir. 1979)("Water is a precious and limited resource throughout the Northern Great Plains."). The ruling below wholly excludes from NEPA, preservation actions which themselves cause no immediate change in the physical environment. This is so, even where such actions preclude human intervention necessary to protect other important environmental interests - such as, in this case, a plentiful clean water supply for human consumption.

Due to the complicated and dramatic intrusion of a burgeoning human population on all aspects of the global environment, environmental protection is no longer simply a matter of "leaving nature alone."[5] In

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ervation Program Concept Plan and Bottomland Hardwoods Land Protection Plan.

[5] Both lower courts find great favor in the remark of one district judge that "NEPA does not require a federal agency to prepare an EIS in order 'to leave nature alone.'" (App. A at 20a; App. B at 31a, *citing, National Association of Property Owners v. United States*, 499 F. Supp. 1223, 1265 (D.Minn. 1980). The Authority respectfully contends that this maxim is the prod-

certain circumstances, the most environmentally destructive option is to leave nature alone. Often what is warranted is not preservation, but "environmental management."[6] Environmental management entails affirmative conduct to maintain a desired balance in an ecosystem that has been unbalanced, often by some human disruption. The progressive character of environmental management stems from a recognition that mankind must exercise active stewardship over the environment. By assuming that preservation is always the most environmentally sound course of action, the ruling in this case may contribute to future environmental degradation by excluding from NEPA environmentally harmful actions taken in the name of preservation.

The court of appeals held that pure preservation actions will never have an adverse impact on the human environment. (App. A at 22a (Where "land is earmarked as a wildlife habitat and migratory bird refuge . . . this intended 'use'. . . has no significant environmental impact.")). Plainly this holding is inaccurate, where preservation would preclude a pro-active plan of environmental management designed to pro-

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uct of a simplistic, shortsighted and incomplete understanding of environmental protection.

[6] It is now recognized that wildlife management does not mean absolute protectionism. One of the most important tasks of the wildlife manager is to control the numbers of species which become over abundant in limited park ecosystems because they are freed from the threats of predation and hunting.

Schectman, *"The Bambi Syndrome:" How NEPA's Public Participation In Wildlife Management Is Hurting The Environment*, 8 Envt'l L. 611, 642 (1978).

mote a balanced ecosystem. *See, e.g., Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1240 (D.C.Cir. 1980)(state plan to promote moose population entailed killing wolves); *American Horse Protection Assoc. v. Andrus*, 608 F.2d 811, 814 (9th Cir. 1979)(action to protect grasslands entailed relocation of wild horses). If permitted to stand, the lower court's ruling will eliminate the need for agencies to consider NEPA at all even when the preservation action precludes another federal, state or private environmental body from engaging in wildlife management.[7]

IV. *The Decision Below Misapplied Metropolitan Edison To Exclude From NEPA Federal Actions Which Preserve The Physical Environment.*

The court of appeals rests its decision excluding preservation actions from NEPA on this Court's holding in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Based on *Metropolitan Edison*, a case involving the re-start of

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[7] The fallacy in excluding preservation actions from NEPA is also illustrated by actions outside the realm of wildlife management. For instance, suppose the state in administering its forests engaged in a practice of extinguishing naturally caused fires. Suppose further that FWS then acquired a portion of these forests for a refuge and, with respect to these lands, adopted a contrary policy of allowing natural fires to burn themselves out reasoning that fires from electrical storms would promote the growth of sequoias. *See, e.g., Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1194 (9th Cir. 1988)(testimony that mineral soil needed for sequoia reproduction was provided by lightning fires). FWS's acquisition would escape NEPA review under the ruling of this case because it "leaves nature alone" by merely preserving the forest in its natural state, even though the practice of allowing fires to burn freely raises obvious environmental concerns that should be fully explored in a NEPA review.

the Three Mile Island nuclear plant, the lower court concluded that FWS was not obliged to prepare an EIS because pure preservation actions do not change the physical environment. (App. A at 21a ("The acquisition of a negative easement . . . does not result in the requisite 'change' to the physical environment.")). This holding is primarily the result of a misunderstanding and misapplication of *Metropolitan Edison.*

A. *Metropolitan Edison Does Not Turn On The Causal Relationship Between The Federal Action And A "Change In The Physical Environment."*

It is elementary that NEPA governs (1) major federal actions that (2) may cause an adverse environmental impact or effect. NEPA, § 102(C), 42 U.S.C. § 4332(C). In order for an environmental effect to warrant consideration under NEPA there must be a "reasonably close causal relationship between a change in the physical environment and the *effect* at issue." *Metropolitan Edison*, 460 U.S. at 774 (emphasis added). The "effect" at issue in *Metropolitan Edison* was the psychological harm that allegedly would result from people's perceptions of the "risk of a nuclear accident." Yet because "a risk, is, by definition unrealized in the physical world," this Court held that there was no causal relationship between the alleged effect, psychological harm, and a change in the physical environment. *Id.* at 775. For purposes of the present case it is important to note that *Metropolitan Edison* did not focus on the relationship between the *federal action* and a "change in the physical environment," but, rather, involved the relationship between the alleged *effect* and a "change in the physical environment." *Metropolitan Edison*, 460 U.S. at 774 ("[T]he terms 'environmental effect' and 'en-

vironmental impact' . . . (must) include a requirement of a close causal relationship between a change in the physical environment and *the effect at issue.*")(emphasis added).[8]

> Nonetheless, the opinion by the court below states:
>
> The Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy* makes clear that the inquiry in NEPA cases is whether the *federal action* at issue is "proximately related to a *change* in the physical environment." 103 S.Ct. at 1561 (emphasis added).

(App. A at 21a). Herein lies the court of appeals' fundamental analytical error. Contrary to the lower court opinion, nothing in *Metropolitan Edison* suggests that the federal action in and of itself must constitute a change in the physical environment of the specific site affected. Yet this is the holding below. (*See* App. A at 21a)("The acquisition of a negative easement. . .does not result in the requisite 'change' to the physical environment.")). The court of

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[8] Thus, this Court in *Metropolitan Edison* did not require that the re-start of Three Mile Island be proximately related to a change in the physical environment, only that the alleged effect, psychological harm, be related to such a change. Of course NEPA requires one uninterrupted causal chain, beginning with (1) a federal action that (2) causes environmental effects that, in turn (3) are causally related to a change in the physical environment. The point to emphasize, is that the "change in the physical environment" elucidated by *Metropolitan Edison* need not be contemporaneous with the taking of the federal action, but may manifest itself later in time as the effects of a federal action are felt.

appeals has shifted the causal requirement of a change in the physical environment, from the environmental effect alleged, to the federal action at issue. This misreading of *Metropolitan Edison* gravely distorts the law of NEPA.

Plainly, the focus of NEPA is on adverse environmental effects, not on the metaphysical essence of the federal action.[9] If these effects are causally related to a change in the physical environment, they are properly subject to NEPA, without regard to the particular character of the federal action. *Metropolitan Edison*, 460 U.S. at 774. Thus, title transfers - federal actions that do not themselves change the physical environment - are still subject to NEPA.[10] Similarly, often an agency must prepare an EIS when granting a lease, license or permit or before issuing a recommendation or proposal, even though such ac-

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[9] Instructive is *City of New York v. United States Dept. of Transp.*, 715 F.2d 732 (2d Cir. 1983); *cert denied*, 465 U.S. 1055 (1984). The second circuit noted that the federal action of transporting radioactive waste did not appear to use a natural resource, *Id.* at 742; in other words the federal action did not "change in the physical environment." While the court opined that "the movement of radioactive material along highways (could) be considered a 'use' of the surrounding air," *Id.* at 742, n.9, the applicability of NEPA was not dependent on the federal action having a close causal relationship to a "change in the physical environment." It was enough that the alleged effect, a possible accident, would cause adverse change in the physical environment.

[10] *See, e.g., Lockhart v. Kenops*, 927 F.2d 1028, 1032 (8th Cir. 1991), *cert. denied*, ___ U.S.___ , 112 S.Ct. 186 (1991); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); *Conservation Law Foundation v. General Services Admin.*, 707 F.2d 626, 633 (1st Cir. 1983).

tion likewise does not change the physical environment.[11]

Notwithstanding the absence of change in the physical environment, title transfers, leases, licenses, recommendations and proposals are subject to NEPA, because they create a "risk" that subsequent action may injure the physical environment. "The Supreme Court has indicated that environmental risks are environmental effects that fall within NEPA." D. Mandelker, *Law & Litigation*, § 8.44 n.1 (1984)(citing *Metropolitan Edison*); *see also Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 100 (1983)("An agency must allow all significant environmental risks to be factored into its decision."); 40 C.F.R. § 1508.27(b)(5)(The "significance" of a major federal action depends in part on "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique and unknown risks.").[12] Again, the failure of

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[11] *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988)(sale of leases created risk of substantial impact on environment), *cert. denied*, 489 U.S. 1012 (1989); *La Flamme v. Federal Energy Regulatory Com.*, 852 F.2d 389 (9th Cir. 1988)(FERC issuance of license for hydroelectric plant must comply with NEPA); *Aberdeen & R. R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 320 (1975)(EIS required at time agency makes a recommendation or report on proposal for federal action).

[12] *See also*; *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146 (1981)(dictum)(proposal to store nuclear weapons would trigger obligation to prepare EIS to consider environmental hazards); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 587-88 (9th Cir. 1985)(EIS must consider risk to water quality arising from possible landslides triggered by road construction), *rev'd on other grounds sub. nom., Lyng v. North-*

the court of appeals to recognize FWS's duty to address in an EIS the risk to water supply created by the agency's action was the product of a misreading of *Metropolitan Edison.*

B. *Metropolitan Edison Does Not Exclude From NEPA Risks Of Environmental Injury.*

The court of appeals has adopted the finding of the district court that the "same element of risk is present" in the instant case as was at issue in *Metropolitan Edison.* (App. B at 36a).[13] The lower courts fail to appreciate that the "risk" analysis presented in this case is wholly distinct from that discussed in *Metropolitan Edison.* The decisions below state that, because environmental "risks" are not "changes in the physical environment," the environmental injuries that would result should such risks materialize, need not be considered in an EIS.[14]

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west Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *City of New York*, 715 F.2d at 745 (action posed risks warranting careful consideration under NEPA).

[13] The court of appeals avoids explicitly discussing the question of "environmental risk" raised in this case, instead choosing to adopt the lower court's reasoning. (App. A at 3a ("Rather than dilute the strength of the district court's reasoning and pollute the legal environment with an expansive discussion of our own, we write only to express the depth of our commitment to the district court's fluid opinion.")).

[14] In this regard, Professor Mandelker apparently has prophesied the lower courts' misinterpretation of *Metropolitan Edison* when he states:

> The decision (*Metropolitan Edison*) could cast doubt on cases which have required agencies to analyze the environmental risks of their action although the Court did not appear to

The Authority has not asked FWS to prepare an EIS to consider injury caused solely by the *risk* of a water shortage. For instance, FWS was not asked to prepare an EIS to consider any psychological harm to the residents of east Texas arising from their perception of the risk of a water shortage. The Authority concedes that a risk of a water shortage, being "unrealized in the physical world," is not a change in the physical environment and any injury flowing therefrom would not trigger an EIS. *Metropolitan Edison*, 460 U.S. at 775. To the contrary, the Authority asked FWS to consider the injury to the physical environment should the risk of a water shortage be realized. Although lost on the courts below, the distinction between injury caused by a "risk *qua* risk" and injury caused by the realization of a risk was carefully noted by Justice Rehnquist in *Metropolitan Edison*.

> [I]n this case (*Metropolitan Edison*) we are considering effects caused by the risk of an accident. The situation where an agency is asked to consider effects that will occur if a risk is realized . . . is an entirely different case.

Metropolitan Edison, 460 U.S. at 775, n.9. This qualification is wholly consistent with precedent that requires an agency to consider the environmental injury that would result if realization of a risk posed by

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disagree with these cases.

D. Mandelker, *NEPA Law & Litigation*, § 8.43 (1984). This petition should be granted to clarify that an EIS must consider significant environmental risks when the realization of such risks would adversely change the physical environment.

agency action would manifest a change in the physical environment. *See* note 12, *supra* and accompanying text. The subtle, but critical, distinction between injury caused by a "risk *qua* risk" and injury caused by realization of a risk, seems also to have escaped other lower courts. *See, e.g., No GWEN, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)(discussion of district court's misplaced reliance on *Metropolitan Edison* to place risk created by federal action outside NEPA). It is beyond question that the realization of a water supply crisis would entail a change in the physical environment (*e.g.*, desertification, loss of wildlife and foliage). The Authority presented to FWS significant evidence demonstrating the likelihood of such a shortage and the injury that would result therefrom. The corollary in *Metropolitan Edison* to the effect complained of in this case, the effect of a nuclear accident, was considered by the Nuclear Regulatory Commission (the "NRC") and this Court indicated that this type of risk was cognizable under NEPA.

As a final note, the environmental harm articulated by the Authority is not comparable to the psychological harm of concern in *Metropolitan Edison*. A water shortage is causally related to a change in the environment and is unquestionably cognizable under a statute designed to protect "the air, land and water which support life on earth," *Metropolitan Edison*, 460 U.S. at 773, *citing*, Leg. History, 115 Cong. Rec. 40416 (1969)(remarks of Sen. Jackson). Unlike the problem that would have faced the NRC had it been required to study the questions of psychological health, water supply, though not directly within FWS's area of expertise, is within the Department of Interior's

expertise. Requiring FWS to consider the water supply views of its sister agencies, such as the Bureau of Reclamation, would not oblige FWS "to expend considerable resources developing . . . expertise that is not otherwise relevant to (its) congressionally assigned functions." *Metropolitan Edison*, 460 U.S. at 776. The effect of a water supply crisis on the physical environment cannot be overstated. A lack of water threatens all life in the affected area. The loss of forest, crops and wildlife, the drying of streams, lakes and springs and the scorching of land are physical changes that result from a water shortage - they are not merely psychological effects that exist in the minds of men.

While action taken to preserve the environmental *status quo*, by its very terms, does not itself cause a change in the physical environment of the specific site affected, (App. A at 20a and 21a, *citing*, *Ono v. Harper*, 592 F. Supp. 698, 701 (D. Hawaii 1983)), it may induce conditions that will result in deleterious change to the surrounding physical environment. In other words, such action creates the risk of significant environmental injury. This petition should be granted to clarify the Court's holding in *Metropolitan Edison*, and, in particular, the aspect of that decision regarding an agency's obligations to prepare an EIS where the realization of such a risk would result in an adverse "change in the physical environment."

Under the facts of this case, FWS's action to preserve land for inclusion in the National Refuge System inhibits Texas' management of its limited water supply resources thereby creating the risk of a water shortage. This risk of injury to the physical environment must be considered under NEPA.

CONCLUSION

The petition for a writ of certiorari should be granted. By excluding FWS's action in this case from NEPA, the decision below has injected a substantive bias in favor of preservation that is inconsistent with NEPA's outcome neutral application. By treating preservation as wholly consistent with NEPA's objectives, the decision below fails to appreciate that preservation is not always the optimal environmental response. Finally, the legal basis to support the exclusion of preservation actions from NEPA, is derived from a misapplication of the rule in *Metropolitan Edison* that environmental effects be causally related to a change in the physical environment.

Respectfully submitted,

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June 2, 1992

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 90-4761.

SABINE RIVER AUTHORITY,
Plaintiff-Appellant,

and

Texas Water Conservation Association,
Plaintiff-Intervenor-Appellant,

v.

U.S. DEPARTMENT OF INTERIOR et al.,
Defendants-Appellees.

and

The Sierra Club and the National Audubon Society,
Defendants-Intervenors-Appellees.

Jan. 28, 1992.

Rehearing Denied March 4, 1992.

Action was brought challenging the Fish and Wildlife Service's compliance with the National Environmental Policy Act (NEPA) in connection with proposed acquisition of conservation easement on wetlands habitat. On cross motions for summary judgment, the United States District Court for the Eastern District of Texas, Paul N. Brown, J., 745 F.Supp. 388, dismissed plaintiffs' claims, and plaintiffs appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) river authority and conservation association that wanted wetlands area for construction of

reservoir suffered sufficient "injury in fact" from grant of nondevelopment easement to have standing to challenge acquisition of easement based on Service's failure to prepare environmental impact statement (EIS), but (2) actions of the Service in acquiring nondevelopment easement which prohibited any change in status quo did not amount to "major federal action significantly affecting quality of human environment" so as to mandate preparation of EIS.

Affirmed.

William H. Burchette, Christine C. Ryan, Jorden Schulte & Burchette, Washington, D.C., Earl Roberts, Jr., Roberts, Hill & Calk, Longview, Tex., for Sabine River Authority.

Michael J. Booth, Frank R. Booth, Booth & Newsom, Austin, Tex., Ruth H. Yeager, First Asst. U.S. Atty., Tyler, Tex., Lisa Hemmer, Atty., Robert L. Klarquist, Dept. of Justice, Appellate Section, Environmental Natural Resources, Washington, D.C., for Texas Water Conservation Ass'n.

Jos. Irion Worsham, Worsham, Forsythe, Samples & Wooldridge, Dallas, Tex., for Little Sandy Hunting & Fishing Club.

Robert G. Dreher, Sierra Club Legal Def. Fund, Washington, D.C., for Sierra Club and Nat. Audubon Society.

Appeals from the United States District Court for the Eastern District of Texas.

Before GOLDBERG and GARWOOD, Circuit Judges, and BUCHMEYER,* District Judge:

GOLDBERG, Circuit Judge:

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* District Judge for the Northern District of Texas, sitting by designation.

This case is for the birds—thousands of them. And we mean that in no facetious sense.

At issue is a non-development easement on 3800 acres of land in East Texas, containing high-quality wetlands and wildlife habitat essential to migratory waterfowl. The Little Sandy Hunting and Fishing Club donated the easement to the U.S. Fish and Wildlife Service in an effort to guarantee that the wetlands would be preserved in their pristine state without the corrupting effect of commercial, agricultural, and industrial development. By accepting the easement, the Fish and Wildlife Service has thus insured that migratory birds and other wildlife can flourish there.

The Sabine River Authority and the Texas Water Conservation Association, though not unsympathetic to the plight (and flight) of our fine feathered friends, filed a lawsuit alleging that the Fish and Wildlife Service violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, by failing to prepare an Environmental Impact Statement (an "EIS") in connection with the acquisition of the easement. When the district court dismissed their claims by way of summary judgment, *Sabine River Authority v. United States Dept. of Interior*, 745 F.Supp. 388 (E.D.Tex.1990), they appealed. We affirm.

The district court correctly dismissed the claims brought by the Sabine River Authority and the Texas Water Conservation Association, and we are hard-pressed to improve upon its scholarly work. Its survey of the relevant case law was extensive, its analysis persuasive. Rather than dilute the strength of the district court's reasoning and pollute the legal environment with an expansive discussion of our own, we write only to express the depth of our commitment to the district court's fluid opinion. We must remediate in one area, however, filtering out the minute particles of contaminant in the district court's "standing" water.

PHASE I

Wetlands, with its swamps, marshes, bogs, mud flats and other water-dependent community types, are an ecological treasure. They play a vital role for wildlife by providing nesting and habitat for many species of fish, birds, plants and other wildlife. For the bird community, wetlands foster high species diversity, density, and productivity by providing both food and habitat, in the form of nesting sites, breeding and rearing areas, feeding grounds, and cover from predators. Office of Technology Assessment, *Wetlands: Their Use and Regulation*, at 5-6, 30, 52 (1984). Many endangered species rely on our wetlands for their survival and reproductive success. Without the wetlands, we are all but assured of their extinction.

Beyond the direct import of wetlands to wildlife, they also serve other equally significant environmental functions. One of the more apparent is their favorable effect on our water quality. By filtering contaminants out of water before they can reach the open water, wetlands serve as nature's own water purifier. By absorbing large amounts of water, wetlands protect us from potential flooding.

As with many of our most precious natural resources, our wetlands are threatened by commercial, agricultural, and industrial development. In the last 200 years, thirty to fifty percent of our nation's wetlands have disappeared. Because wetlands are critical to flood control, water supply, water quality, and, of course, wildlife, their rapid disappearance is setting the stage for what may eventually become a significant environmental catastrophe. The State of Texas alone has lost 8 million acres, nearly half of its original wetlands. With only some 7.6 million acres remaining, wetlands presently constitute a mere 4.4 percent of Texas' acreage. As the wetlands continue to shrink, the threat to our environment escalates.

Recognizing that our nation's wetlands are vital to the environmental equilibrium, the Fish and Wildlife Service embarked on a laudatory effort to preserve the existing wetlands. The Fish and Wildlife Service is charged with the responsibility of protecting and maintaining the population of migratory waterfowl, other wildlife resources, and endangered species. Toward that end, it established the National Wildlife Refuge System, a project that has earned widespread approval from environmental groups. Through the Refuge System, the Fish and Wildlife Service has acquired millions of acres of environmentally rich lands, lands which are to be preserved in their natural state: no development, no mining, just mother nature's original recipe without any artificial ingredients. These lands provide a winter home to the thousands of migratory birds utilizing the "Central Flyway" and support large populations of Native North American wood ducks. U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* at 15 (1984).

Some of the land is acquired in fee simple; but since the Fish and Wildlife Service merely seeks to prohibit environmentally destructive activity on the land, much of it is obtained in the form of leases and easements which preclude development of the land. This method proves far more economical in effectuating the goal of preventing adulteration to the lands, because the government need not buy the property and take title outright; it can accept a nondevelopment easement—a promise by the owner to refrain from developing the property in a manner inconsistent with wetland preservation—and thereby achieve the goal of protecting the environmental status quo at a fraction of the cost.

The Fish and Wildlife Service acquired the Texas wetlands at issue in this case precisely in this manner. Little Sandy Hunting and Fishing Club donated a nondevelopment easement on approximately 3800 acres of its land to the Fish and Wildlife Service so that the character of the

wetlands would remain unchanged, undeveloped, in perpetuity. These lands had been targeted by the Fish and Wildlife Service for several years because of its particularly rich natural attributes. Some studies rated the vegetation on Little Sandy's land as "one of the most pristine bottomland areas i[n] the state [of Texas]." The lands consist of "old-growth timber," including willow, oak, hickory, gum, elm, ash, hackberry, palmetto, switchcane, and possum haw understory, and its bottomlands play host to such dwellers as mallards, gadwalls, ringnecks, and wood ducks.

The Sabine River Authority and the Texas Water Conservation Association, cognizant that the federal government's acquisition of this land foreclosed the State of Texas from taking the property by means of eminent domain, were less than pleased to learn of the donation. They had given serious consideration to using that land to construct the Waters Bluff Reservoir, a $ 158 million, forty-five thousand acre project along the Sabine River in Smith, Upshur, and Wood Counties. Their plans for the construction of the reservoir, aimed at satisfying the anticipated need for additional water over the next forty years, were still in the preliminary stages: they had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the 300 thousand plus acre feet of water that the reservoir would generate each year. Nevertheless, they were dissatisfied with the turn of events and filed suit in the Eastern District of Texas alleging that the Fish and Wildlife Service had failed to comply with the procedural requirements of NEPA by not preparing an Environmental Impact Statement (an "EIS") in connection with its acquisition of the Little Sandy non-development easement. They alleged that the easement was interfering with their long-term plan to take the property by eminent domain, construct the Waters Bluff Reservoir, and thus insure that the state's water supply would not be placed in jeopardy in the calendar year 2030. Invoking NEPA, they asserted

that the Fish and Wildlife Service's acquisition of the easement constituted a "major federal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), thereby necessitating the preparation of an EIS.

In a comprehensive opinion, 745 F.Supp. 388 (E.D.Tex.1990), the district court dismissed their claims by way of summary judgment. The court reasoned that the Fish and Wildlife Service had prepared an adequate Environmental Assessment (the "EA") and had issued a "Finding of No Significant Impact" ("FONSI") as a precursor to acquiring the easement. Concluding that there was no corresponding change in the physical environment flowing from the acquisition of the non-development easement, the district court held that the Fish and Wildlife Service's decision to forego an EIS was not arbitrary and capricious. *Id.* at 392-97. It dismissed the lawsuit, and this appeal followed.

PHASE II

A preliminary issue in this case, indeed in every case, is whether the party bringing the lawsuit has standing. After rejecting on the merits plaintiffs' challenge to the Fish and Wildlife Service's decision to forego an EIS, the court below remarked that plaintiffs had no standing to bring this lawsuit in the first place. It reasoned that:

> The Court's finding that the plaintiffs' claims are not within NEPA's scope and that they are contrary to NEPA's purpose compels the conclusion that the plaintiffs lack standing to assert a claim under NEPA. The plaintiffs' interest in constructing a reservoir is unquestionably an interest that is *subject* to the provisions of NEPA, but it is not an interest that NEPA was designed to protect.

745 F.Supp. at 397. In essence, the district court concluded that because the Fish and Wildlife Service was not obli-

gated under NEPA to prepare an EIS under the circumstances present in this case (a conclusion with which we agree), the injuries alleged by the plaintiffs as a consequence of the absence of an EIS were not within the zone of interests protected by NEPA. With that conclusion we disagree.

The standing inquiry has constitutional, statutory, and judicially formulated components. *North Shore Gas v. EPA*, 930 F.2d 1239, 1242-43 (7th Cir.1991). It has as its origins the constitutional requirement that federal courts only decide cases or controversies. Constitution, Article III, § 2. When we say that a particular plaintiff has no standing to bring the lawsuit in the constitutional sense, we mean that the plaintiff has not suffered an injury which is redressible by the court. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). This inquiry places not too heavy a burden on a prospective plaintiff because even "a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing" under the Constitution. *North Shore Gas*, 930 F.2d at 1242.

From an Article III perspective, the plaintiffs have standing. "Injury in fact is not confined to economic injury, but may include injuries to aesthetics and well-being." *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir.1983).

> The procedural injury implicit in agency failure to prepare an EIS—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that they can] expect[ ] to suffer whatever environmental consequences the project may have.

City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir.1975); *accord Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 932, *modified*, 850 F.2d 599 (9th Cir.1988); *see also South*

East Lake View Neighbors v. Dept. of Housing and Urban Development, 685 F.2d 1027, 1039 (7th Cir.1982) (construing *City of Davis* to hold that the "injury occurred with the creation of a risk that potential environmental damage would go undiscovered"); *cf. North Shore Gas,* 930 F.2d at 1242 ("a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing in the undemanding Article III sense"); *but see Greenpeace USA v. Stone,* 748 F.Supp. 749, 755 (D.Hawaii 1990) (expressing concern over whether a plaintiff with a geographical nexus to project satisfies the injury in fact requirement by virtue of a procedural injury alone), *appeal dismissed as moot,* 924 F.2d 175 (9th Cir.1991).

The Sabine River Authority has been charged by the State of Texas with the weighty responsibility of managing, conserving, and monitoring the waters of the Sabine River in order to meet the "domestic uses of the people in the district, including all necessary water supplies for cities and towns." Water Aux. Laws art. 8280-133, § 14(d). It has alleged an economic injury (shortage of water supply) attendant to the Fish and Wildlife Service's acquisition of the Little Sandy Easement. The Texas Water Conservation Association is an organization incorporated under the laws of the State of Texas which has as its stated mission the conservation of water resources of the state. Its membership includes "river authorities, individuals, firms, corporations, cities, water districts, public and private agencies and groups dedicated to the task of conserving, developing, protecting and utilizing the water resources of Texas for beneficial purposes." This organizational plaintiff has a "sufficient geographical nexus" to the Little Sandy property, and the interests at stake affect the members of the organization such that the organization has standing to bring the claims on their behalf. *See Save Our Wetland, Inc.,* 711 F.2d at 640 (organizational plaintiff had standing because member of organization who fished at site in question was "injured" by adverse aesthetic im-

pact). The injuries that these parties allege relate to the adverse environmental effects that they will experience as a result of the Fish and Wildlife Service's acquisition of the Little Sandy easement. As the district court observed:

> One effect of the [Fish and Wildlife Service]'s action is that as long as the easement remains in the National Wildlife Refuge System, [the Sabine River Authority] cannot build the Waters Bluff Reservoir. Although federal law provides certain procedures by which land may be released from the Refuge System, there is certainly a risk that [the Sabine River Authority] may not convince either the Congress or the Secretary of the Interior to relinquish the easement.

745 F.Supp. at 396 & n. 6. According to the plaintiffs, the Sabine River Authority's inability to condemn this property and build the Waters Bluff Reservoir on that site creates a substantial risk that the region will experience water shortages some forty years in the future. Although there is necessarily some speculation attendant to predictions of this sort, the injuries alleged are not "too speculative to support their standing." *South East Lake View Neighbors*, 685 F.2d at 1035. While still in the early planning stages, plaintiffs were intent on going forward with the construction of the Waters Bluff Reservoir to pretermit any potential water shortage problems; the Little Sandy Easement has made that effort a virtual nullity. We therefore find "a fairly traceable causal connection between the defendant's allegedly illegal conduct and the plaintiff's purported injuries," *id.* at 1036, sufficient to confer standing in the constitutional sense.

In the context of NEPA, however, the Supreme Court has recently explained that beyond the constitutional standing requirements, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose

violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation*, ___U.S. ___, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990) (emphasis in original); *see also Greenpeace USA*, 748 F.Supp. at 756 (*Lujan* "appears to heighten the requirements for establishing actual injury for purposes of standing under NEPA."). "[T]he only people who may sue to enforce a law are people who belong to the class that the law was designed to protect." *North Shore Gas*, 930 F.2d at 1243. In other words, "only intended beneficiaries of a statute can seek relief under it." *Id.* To illustrate, the Supreme Court posited that court reporters are plainly aggrieved when an agency failed to comply with a statutory provision that requires that all proceedings be transcribed; nevertheless, because the parties to the proceedings, and not the court reporters, are the intended beneficiaries of the statutory provision, the parties and not the court reporters would have standing to challenge the agency's non-compliance with the statute. *Lujan*, 110 S.Ct. at 3186.

We are persuaded that the injuries alleged by the plaintiffs in their complaints—harmful effects on the quality and quantity of East Texas' water supply—"are among the *sorts* of interests" that NEPA was specifically designed to protect. *Lujan*, 110 S.Ct. at 3187. These alleged injuries fall squarely within the class of injuries that NEPA safeguards: the circuit courts, to be sure, are flooded with cases which elucidate that water quality and water supply are prototypically matters of great environmental concern. *E.g., Olmsted Citizens for a Better Community*, 793 F.2d 201, 205 (8th Cir.1986) (a federal action which "poses a threat to the physical resources of the area because of anticipated . . . water supply problems" must be preceded by an EIS); *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 851-53 (9th Cir.1979) (holding that an EIS was required "to evaluate the environmental consequences of [the] decision [to divert water to industrial use]"); *City of Davis v. Coleman*, 521 F.2d 661, 671-72 (9th Cir.1975)

(allegations in complaint "that the planned industrial development . . . may adversely affect the quality and quantity of the city water supply" established injury in fact within the zone of interests of NEPA). Indeed, NEPA itself articulates that the protection of the water quality and supply is an important concern of the statutory scheme. *See* 42 U.S.C. §§ 4321, 4331(c); *see also Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 103 S.Ct. 1556, 1560-61, 75 L.Ed.2d 534 (1983) (quoting from statements of two principal sponsors of NEPA which identify water supply and quality as a concern of NEPA). Moreover, these plaintiffs are the proper plaintiffs to raise these claims. Although "the intended beneficiaries of NEPA are individual citizens . . . the statute expressly contemplates that state and local governments are to play an important role in the effectuation of national environmental policy." *City of Davis,* 521 F.2d at 672 (citing 42 U.S.C. §§ 4331(a), 4332(2)(C), 4332(2)(F), 4341(4), 4345(1)).

This is not a case brought by a disappointed contractor who alleges that he has been injured because he would have been hired to build the Waters Bluff Reservoir had the Fish and Wildlife Service not accepted the negative easement. Like the court reporter example posited in *Lujan,* the contractor, though arguably aggrieved as a result of the Fish and Wildlife Service's acceptance of the negative easement, would not have standing under the "zone of interests" test because NEPA was not designed to protect contractors' rights: it was designed to protect the environment. Perhaps the best way to illustrate the point is to put the proverbial cart before the horse. If, contrary to our holding on the merits, NEPA *did* require the Fish and Wildlife Service to prepare an EIS in connection with the Little Sandy easement, we would still have to consider whether these plaintiffs have standing to challenge the Fish and Wildlife Service's non-compliance. We think it is quite plain that the Sabine River Authority and the Texas

Water Conservation Association would (and do) have standing to bring a lawsuit because the alleged harm flowing to these plaintiffs from the defendant's non-compliance with NEPA is of a kind with which NEPA is concerned.

PHASE III

This case arises under the network of NEPA, a statute drafted to ensure that federal agencies "carefully consider detailed information concerning significant environmental impacts," and at the same time "guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 109 S.Ct. 1835, 1845, 104 L.Ed.2d 351 (1989); *accord North Buckhead Civic Ass'n v. Skinner,* 903 F.2d 1533, 1540 (11th Cir.1990). It is a procedural statute that demands that the decision to go forward with a federal project which significantly affects the environment be an environmentally conscious one. The statute does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a "hard look at environmental consequences." *Robertson,* 109 S.Ct. at 1846 (quoting *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976)). Indeed, NEPA does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.*

How much information the agency must process is the subject of this litigation. NEPA instructs that federal agencies:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action, [and]
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented. . . .

42 U.S.C. § 4332(2)(C). Thus, NEPA directs federal agencies to prepare what is commonly known in the industry as an Environmental Impact Statement (an "EIS") when it engages in "major Federal action[ ] significantly affecting the environment."

> "An environmental impact statement is intended to detail the environmental and economic effects of any proposed federal action so that those not directly involved can understand and give meaningful consideration to and make appropriate comment on the factors involved. It also ensures that the decisionmaker give serious weight to environmental factors in making discretionary choices."

State of Louisiana v. Lee, 758 F.2d 1081, 1084 (5th Cir.1985). An EIS is "not required for *non* major action or a major action which does not have *significant* impact on the environment." *Sierra Club v. Hassell,* 636 F.2d 1095, 1097 (5th Cir. Unit B 1981) (emphasis added).

To assist federal agencies in resolving whether they must prepare an EIS, the federal Council on Environmental Quality ("CEQ") has issued regulations to which these agencies can turn for guidance. *Sierra Club v. March,* 769 F.2d 868, 870 (1st Cir.1985). These regulations are entitled to substantial deference, *Robertson,* 109 S.Ct. at 1848, and "are binding on federal agencies." *Fritiofson v. Alexander,* 772 F.2d 1225, 1236 (5th Cir.1985).

> The CEQ regulations permit federal agencies to make a preliminary "Environmental Assessment" ("EA") aimed at determining whether the environmental effects of a proposed action are "significant." 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27 (1984). According to these regulations, the EA is a "concise" document that "briefly" discusses the relevant issues and either reaches a conclusion that preparation of an EIS is necessary or concludes with a "Finding of No Significant Impact" (called in environmental jargon, a "FONSI"). *Id.* §§ 1508.9, 1508.13.

Sierra Club v. March, 769 F.2d at 870. Thus, "[t]he purpose of an EA is to 'provide sufficient evidence and analysis for determining whether to prepare an [EIS].' " *Fritiofson,* 772 F.2d at 1236 (quoting 40 C.F.R. § 1508.9(a)(1)). The EA is "a rough- cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is necessary." *Cronin v. U.S. Dept. of Agriculture,* 919 F.2d 439, 443 (7th Cir.1990). The EA will come to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact (a "FONSI") necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS. *Fritiofson,* 772 F.2d at 1236; *Marsh,* 769 F.2d at 870.

When, as in this case, the agency concludes that the preparation of an EIS is not required based on a FONSI, an aggrieved party may challenge the decision in federal court under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A). Before today, our court instructed that a reviewing court should apply the moderately deferential "reasonableness" standard—rather than the highly deferential "arbitrary and capricious" standard adopted by other

circuits—in reviewing an agency's decision to forego an EIS. *See Fritiofson,* 772 F.2d at 1237. However, in *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) ("*Oregon Natural*") the Supreme Court held that an agency's decision not to prepare a supplemental EIS is reviewable under the "arbitrary and capricious" standard. This intervening decision by the Supreme Court warrants the abandonment of the "reasonableness" standard.[1] Even though *Oregon Natural* involved an agency's decision not to prepare a *supplemental* EIS as opposed to an agency's decision not to prepare the *original* EIS, the "legal standard for determining when a supplemental EIS is required is 'essentially the same as the standard for determining the need for an original EIS.' " *Fritiofson,* 772 F.2d at 1239 n. 8 (citation omitted). *Oregon Natural* has plainly emasculated our precedent applying the reasonableness standard with respect to the review of an agency's decision to forego a *supplemental* EIS. *See Oregon Natural,* 109 S.Ct. at 1861 n. 23 (citing with disapproval our decision in *Sierra Club v. Froelhlke,* 816 F.2d 205, 210 (5th Cir.1987)). We believe that it has similarly undercut our precedent applying the reasonableness standard with respect to an agency's decision to forego the *original* EIS. *See Lockhart v. Kenops,* 927 F.2d 1028, 1032 (8th Cir.) (holding that the intervening decision of *Oregon Natural* undercut Eight Circuit precedent applying the reasonableness standard with respect review of an agency's decision to forego preparation of an original EIS), *cert. denied,* ___U.S. ___, 112 S.Ct. 186, 116 L.Ed.2d 148 (1991). The standard of review is limited, therefore, to the "arbitrary and capricious" standard. *Id.; see also North Buckhead Civic Ass'n,* 903 F.2d at 1538 (adopting

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[1] The *Fritiofson* panel rejected an invitation to abandon the reasonableness standard in favor of the "arbitrary and capricious" standard adopted by other circuits, recognizing that it could only do so if an intervening Supreme Court decision mandated as much.

"the arbitrary and capricious standard when reviewing agency action in NEPA cases").[2]

Under this highly deferential standard of review, a reviewing court has the "least latitude in finding grounds for reversal." *North Buckhead Civic Ass'n,* 903 F.2d at 1538. It may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors. *Id.; Oregon Natural,* 109 S.Ct. at 1861. Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion. The reviewing court may be inclined to raise an eyebrow under such circumstances, but it must show the proper respect for an agency's reasoned conclusion even if the reviewing

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[2] We recognize that the Eighth Circuit has held that *Oregon Natural* does not control the standard of review in a case where the issue involved is the threshold one of whether NEPA even applies at all. *Goos v. I.L.C.,* 911 F.2d 1283, 1292 (8th Cir.1990). If an agency determines that NEPA does not apply in the first instance, and the agency makes that determination without preparing an EA and without making a finding of no significant impact, the Eighth Circuit applies a reasonableness standard, not *Oregon Natural*'s arbitrary and capricious standard. *Id.* We need not concern ourselves with these distinctions even though there is a substantial question presented in this case as to whether NEPA applies at all; the Fish and Wildlife Service decided to forego an EIS "after assuming the applicability of NEPA, after preparing an EA and after determining that there was no significant [environmental] impact." *Goos,* 911 F.2d at 1292. Thus, the arbitrary and capricious standard of review applies. Although it is arguably a more lenient standard than the reasonableness test, *Fritiofson,* 772 F.2d at 1237-38, the differences between the two standards is not "of great pragmatic consequence." *Oregon Natural,* 109 S.Ct. at 1861 n. 23 ("[O]ur decision today will not require a substantial reworking of NEPA."). And under either standard, we would affirm the judgment below.

court finds the opinions of other experts equally or more persuasive. *Oregon Natural*, 109 S.Ct. at 1861.

> A reviewing court is to review the administrative records as well as other evidence to determine whether the agenc[y] adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary. If the agency[y] engaged in this analysis and reasonably concluded on the basis of [its] findings that an impact statement was not required, [its] determination[ ] will be upheld.

Hassell, 636 F.2d at 1097-98.[3]

When a court like ours is asked to review the decision of a district court which has sat as the reviewing court of first instance, the standard of review that we apply will vary depending on the course of proceedings below. If the district court has conducted an evidentiary hearing, and has drawn factual inferences and made credibility determinations, we must give great deference to the district court's conclusions.

> A court of appeals review of a district court review of an administrative agency's record is indeed an "awkward legal animal," but when the district court's judgment turns on factual matters, or upon the testimony of witnesses, or even upon lengthy evidentiary proceedings, the court of appeals should hesitate to reverse.

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[3] *Hassell* applied the "reasonableness" standard. Nevertheless, we believe that the inquiry under the "arbitrary and capricious standard" is clearly not more rigorous (though also only slightly more deferential) than that articulated in *Hassell*. *See Oregon Natural*, 109 S.Ct. at 1861 n. 23 ("[T]he difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence.").

North Buckhead Civic Ass'n, 903 F.2d at 1539. Where, as here, the district court has resolved the case by way of summary judgment, our review of the district court's conclusions is plenary. We undertake the same task as the district court: we review the materials submitted to the district court (which will include the agency record) and determine whether the agency's conclusions were arbitrary and capricious. *Marsh,* 769 F.2d at 872 (1st Cir.1985). Because the district court's review pursuant to a summary judgment motion cannot turn on credibility determinations or conflicting factual inferences, *International Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264 (5th Cir.1991), we are in precisely the same position as the district court and can evaluate the record *de novo.*

PHASE IV

The Fish and Wildlife Service concluded that by accepting the easement from Little Sandy, it did not undertake a major federal action which significantly affected the environment. It prepared an EA which "adequately considered the environmental consequences of its actions." 745 F.Supp. at 402. The EA came to a finding of no significant impact (FONSI), and accordingly, the Fish and Wildlife Service did not find it necessary to prepare an EIS in connection with the acquisition of the easement. After a painstaking review of the agency record, the district court concluded that there was no clear error in the Fish and Wildlife Service's decision. We agree. As the district court observed:

> The [Fish and Wildlife Service]'s action in this case does not alter the environmental status quo; it does not cause any change in the physical environment. Indeed the purpose of the acquisition of the easement is to foreclose *any* change in the physical environment of a particular wetland site. As the Court observed in *National Association of Property Owners* [*v. United States*], NEPA does not require a federal agency to

> prepare an EIS in order "to leave nature alone." 499 F.Supp. [1223] at 1265 [D.C.Minn. 1980)]. NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is not built.

745 F.Supp. at 394. The district court recognized that the acquisition of the easement by the Fish and Wildlife Service did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an EIS. "An "EIS is not required . . . when the proposed federal action will effect no change in the status quo." *Burbank Anti-Noise Group v. Goldschmidt,* 623 F.2d 115, 116 (9th Cir. 1980), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981). Simply put, we hold that the acquisition of a negative easement which by its terms prohibits any change in the status quo does not amount to "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see Burbank Anti-Noise Group,* 623 F.2d at 116-17 (no EIS required where FAA provided federal financial assistance in connection with the purchase of an airport); *Sierra Club v. Marsh,* 692 F.Supp. 1210, 1221 (S.D.Cal.1988) ("It would be inconsistent with NEPA's purpose to allow the city to use NEPA to obstruct the implementation of a settlement which will protect endangered species."). An EIS need not discuss the environmental effects of continuing to use land in the manner which it is presently being used. *Upper Snake River v. Hodel,* 921 F.2d 232, 235 (9th Cir.1980) (citing *Burbank Anti-Noise Group,* 623 F.2d at 116); *see, e.g., Hassell,* 636 F.2d at 1099 (rebuilding bridge destroyed in hurricane did not require preparation of EIS under regulations then in effect); *Committee for Auto Responsibility v. Solomon,* 603 F.2d 992, 1003 (D.C.Cir.1979) (no EIS required when government leased parking lot to new parking management because no change in the status quo), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980).

The Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy* makes clear that the inquiry in NEPA cases is whether the federal action at issue is "proximately related to a *change* in the physical environment." 103 S.Ct. at 1561 (emphasis added). The acquisition of a negative easement which prohibits development does not result in the requisite "change" to the physical environment. Of course, when the government *conveys* property to, or exchanges land with, a private party that plans to develop the land, an EIS is necessary because the conveyance of property is precipitating a change in the physical complexion of the land. *Lockhart v. Kenops,* 927 F.2d at 1033 (citing *National Forest Preservation Group v. Butz,* 485 F.2d 408, 411-12 (9th Cir.1973)); *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1227 (9th Cir.1988), *cert. denied,* 489 U.S. 1066, 109 S.Ct. 1340, 103 L.Ed.2d 810 (1989); *Conservation Law Foundation of New England, Inc. v. General Services Administration,* 707 F.2d 626, 633 (1st Cir.1983). But by merely accepting title to the property—or, as in this case, accepting a negative easement which precludes any development of the land whatsoever—the government is not undertaking a project that changes the character or function of the land. *See Ono v. Harper,* 592 F.Supp. 698, 701 (D.Hawaii 1983) (no EIS required where proposed transfer of title would not cause any change in the physical environment). We view the Fish and Wildlife Service's "action" in accepting the negative easement as tantamount to "inaction." *See Defenders of Wildlife v. Andrus,* 627 F.2d 1238, 1243 (D.C.Cir.1980) (no EIS required when federal government decides not to exercise its authority to prevent the State of Alaska from killing wolves on federal land); *State of Alaska v. Andrus,* 591 F.2d 537, 541 (9th Cir.1979) (same); *cf. Bunch v. Hodel,* 793 F.2d 129, 135-36 (6th Cir.1986) (abdication of the Fish and Wildlife Service's obligations under the terms of a lease and the Mi-

gratory Bird Conservation Act could not be viewed as "inaction").

The agency came to a finding of no significant environmental impact, and we detect no error in that forecast.[4] "The court finds it unlikely that a no impact finding would be held unreasonable where the government seeks to acquire some additional parcels of land for environmental mitigation purposes." *Sierra Club v. March*, 692 F.Supp. at 1221. The land is earmarked as a wildlife habitat and migratory bird refuge. We agree with the Fish and Wildlife Service and the district court that this intended "use" of the Little Sandy property has no significant environmental impact. On this point, we note that we are not altogether persuaded that the anticipated harm to the East Texas water supply can be precisely linked to the federal action at issue here. Although for purposes of standing we have held that the plaintiffs have established an injury in fact sufficient to bring these claims, an EIS is only necessary where there is "reasonably close causal relationship between a change in the physical environment and the effect at issue." *Metropolitan Edison*, 103 S.Ct. at 1561. Aside from the absence of any "change" in the physical environment, we entertain serious doubts as to whether the adverse impact on water quality and supply expected in the year 2030 can be attributed to the Fish and Wildlife Service's acquisition of the Little Sandy easement. In our view, plaintiffs seek to stretch the parameters of predictability to their limits. They ask for environmental clairvoyance, though the agency personnel—and we judges—are but mere mortals.

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[4] Ironically, neither does the defendant-intervenor Sierra Club, an environmental group which for the first time, apparently, has advocated *against* the need for an EIS.

We have given the record more than just a birds-eye view, and finding no reason to migrate from the district court's judgment, we take refuge in its nest.

AFFIRMED.

APPENDIX B

United States District Court,
E.D. Texas,
Texarkana Division.

No. TX-87-36-CA.

SABINE RIVER AUTHORITY,

Plaintiff,

Texas Water Conservation Association,

Plaintiff-Intervenor,

v.

UNITED STATES DEPARTMENT OF INTERIOR, Donald Paul Hodel, in his official capacity as Secretary of Interior, United States Fish and Wildlife Service, Frank H. Dunkel, in his official capacity as Regional Director of the Fish and Wildlife Service, and Little Sandy Hunting and Fishing Club,

Defendants,

The Sierra Club and the National Audubon Society,

Defendants-Intervenors.

Aug. 13, 1990.

Action was brought challenging the Fish and Wildlife Service's compliance with the National Environmental Policy Act in connection with the proposed acquisition of a conservation easement on wetlands habitat. On cross motions for summary judgment, the District Court, Paul N. Brown, J., held that (1) the proposed acquisition did not change the status quo or have a detrimental impact on the environment and, thus, no environmental impact state-

ment was necessary; (2) the environmental assessment prepared by the Fish and Wildlife Service gave adequate consideration to the need for action, to alternatives, and to comments received from other state and federal agencies; and (3) the general plan under which the Service would acquire easements to protect wetlands habitat was not a "proposal" for major federal action that would require an environmental impact statement.

Claims dismissed.

William H. Burchette, Christine Ryan, Jorden Schulte & Burchette, Washington, D.C., and Carl Roberts, Longview, Tex., Frank R. Booth, Booth & Newsome, Austin, Tex., for Sabine River Authority and Texas Water Conservation Ass'n, respectively.

Ruth Harris Yeager, First Asst. U.S. Atty., Tyler, Tex., Lisa Hemmer, U.S. Dept. of Justice, Washington, D.C., Joseph I. Worsham, Dallas, Tex., for Federal defendants and Little Sandy Club, respectively.

Wendy S. Dinner, Washington, D.C., for Sierra Club and National Audubon Society.

MEMORANDUM OPINION AND ORDER

PAUL N. BROWN, District Judge.

Pending before the Court are Motions for Summary Judgment filed by all parties. After carefully reviewing all of the motions and supporting briefs, the lengthy administrative record, and the applicable law, the Court finds that the motions of the defendants should be granted and those of the plaintiffs denied.

I. BACKGROUND

The dispute in this case concerns the decision of the Department of the Interior's Fish and Wildlife Service

("FWS") to accept a conservation easement on 3800 acres of land owned by the Little Sandy Hunting and Fishing Club ("Club"). The FWS's acquisition of this easement conflicts with the plans of plaintiff Sabine River Authority ("SRA") to construct the Waters Bluff Reservoir. If constructed, the reservoir would inundate the lands encompassed by the easement.

Before acquiring the easement, the FWS prepared a draft environmental assessment ("EA") of the proposed acquisition pursuant to Department of Interior regulations implementing the review process mandated by the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"). (AR. P).[1] The FWS also conducted a public hearing on the proposed acquisition. (AR. I). Thereafter, the FWS also issued a "Finding of No Significant Impact" ("FONSI") setting forth the FWS to prepare an environmental impact statement ("EIS") concerning its acquisition of the easement. (AR. G-79). The FWS then accepted the easement.

Plaintiffs' Claims

SRA contends that the FWS's FONSI and decision not to prepare an EIS concerning its acquisition of the easement violated the provisions of NEPA. SRA claims that the FONSI is erroneous because acquisition of the easement is a "major Federal action[ ] significantly affecting the quality of the human environment" that requires the preparation of an EIS. SRA also claims that the FWS's EA is inadequate in several respects and that this matter should be remanded to the FWS for further consideration. Finally, SRA alleges that the acquisition of the easement violated the Fish and Wildlife Act, 16 U.S.C. § 742a et seq. and the Refuge Recreation Act, 16 U.S.C. § 460k et seq., because the terms of the easement do not provide for a right of access for the public.

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[1] "AR" refers to the Administrative Record.

Plaintiff-Intervenor Texas Water Conservation Association ("TWCA") also contends that the FWS should have prepared an EIS concerning its acquisition of the easement. In addition, TWCA asserts that the FWS's Texas Bottomlands Hardwood Preservation Program ("Preservation Program") is itself a "major Federal action[ ] significantly affecting the quality of the human environment" and that the FWS should have prepared an EIS concerning the Preservation Program.

The FWS and the Defendant-Intervenors Sierra Club and National Audubon Society contend that the FONSI is correct since the easement preserves the "environmental status quo" by prohibiting development on the land encompassed by the easement. The FWS also contends that its EA was adequate and that it was not required to prepare an EIS concerning the Preservation Program. Finally, the FWS asserts that the terms of the easement do not violate the provisions of either the Fish and Wildlife Act or the Refuge Recreation Act.

II. STANDARD OF REVIEW

The standard of review that this Court must apply to this case is set forth in *State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir.1985), *cert. den.*, 475 U.S. 1044, 106 S.Ct. 1259, 89 L.Ed.2d 570 (1986).

> NEPA requires the preparation of an [EIS] whenever a major federal action significantly affecting the quality of the human environment is proposed. . . . Judicial review of an agency's decision not to file an [EIS] is governed by the rule of reasonableness . . . whether the agency['s] decision not to develop an impact statement is reasonable and made objectively and made in good faith on a reviewable environmental record. . . . If the decision is reasonable, the determination must be upheld.

Id. at 1083.

The plaintiffs' burden in presenting a NEPA claim is also well- established.

> [T]he court must determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality . . . If the court concludes that no environmental factor would be significantly degraded by the project, [the] determination not to file the [EIS] should be upheld. On the other hand, if the court finds that the project *may* cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement. . . .

Id. at 1084.

The plaintiff "must establish only that the [defendant] was unreasonable in concluding there was no reasonable possibility that the proposed action would significantly degrade any environmental factor." *Id.* at 1085.

The Supreme Court has held that an agency's decision not to file an EIS should be reviewed under the "arbitrary and capricious" standard. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, ___, 109 S.Ct. 1851, 1860, 104 L.Ed.2d 377 (1989). The Court suggested that there is little or no difference between this standard and the "reasonableness" standard that had been applied heretofore by courts in most of the circuits, including the Fifth Circuit. 490 U.S. at ___, 109 S.Ct. at 1861 n. 23. In applying this standard of review, a court "must consider whether the decision [not to prepare an EIS] was based on a consideration of the relevant factors and whether there has been a clear error in judgment". 490 U.S. at ___, 109 S.Ct. at 1861.

An agency's decision not to prepare an EIS may be erroneous for one of two different reasons. The evidence

in the record may indicate that, "contrary to the FONSI, the agency's proposed action may have a significant impact on the human environment", or the record may show that the agency's NEPA review process was "flawed in such a manner that it cannot yet be said whether the [proposed action] may have a significant impact". *Fritiofson v. Alexander,* 772 F.2d 1225, 1238 (5th Cir.1985). If a court finds that the proposed action may have a significant impact, the court should order the agency to prepare an EIS. *Id.* On the other hand, should the court determine that the agency's review was inadequate, the court should remand the case to the agency for further proceedings to correct the inadequacies. *Id.*

III. REVIEW OF THE FONSI

An agency need not prepare an EIS for actions that do not "significantly affect[ ] the quality of the human environment". *Citizen Advocates for Responsible Expansion, Inc. v. Dole,* 770 F.2d 423, 432 (5th Cir.1985). In determining whether particular agency actions "significantly affect[ ] the quality of the human environment", courts have analyzed an agency's action to determine whether those actions may alter the "environmental status quo" or cause a "significant degradation of some human environmental factor".

A federal agency proposing an action must prepare an environmental impact statement if that action may cause "a change in the [environmental] status quo." *Sierra Club v. Hassell,* 636 F.2d. 1095, 1099 (5th Cir.1981).[2] Any agency action that "*may* cause a significant degradation of some human environmental factor" also requires the preparation

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[2] *See also Sierra Club v. F.E.R.C.,* 724 F.2d 1506, 1510 (9th Cir.19850; *Committee for Auto Responsibility v. Solomon,* 603 F.2d 992, 1002-03 (D.C.Cir.1979), *cert. den.,* 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980); *Burbank Anti-Noise Group v. Goldschmidt,* 623 F.2d 115, 116-17 (9th Cir.1980, *cert. den.,* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).

of an EIS. *State of Louisiana v. Lee,* 758 F.2d at 1086. *Lee* and *Hassell* do not set forth different tests, however, since any action that "may cause a significant degradation" of the environment certainly may cause "a change in the environmental status quo". Whether a federal agency's action "may cause a significant degradation of some human environmental factor" is analyzed in light of the "environmental status quo" existing at the time of the proposed action. *Id.*

The principle underlying the determination of whether an agency's action may "significantly affect[ ] the quality of the human environment", by altering the "environmental status quo" or causing "a significant degradation of some human environmental factor" is that NEPA applies only to those federal actions whose effects may cause *changes in the physical environment.* NEPA's legislative history shows that Congress was only concerned with the effects of federal actions that may cause *changes* in the physical environment. "What is involved [in NEPA] is a congressional declaration that. . . . *we will not intentionally initiate actions which do irreparable damage to the air, land, and water. . . .*" *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 772-73, 103 S.Ct. 1556, 1560, 75 L.Ed.2d 534 (1983), *citing,* 115 Cong.Rec. 40416 (1969)(Emphasis original). Indeed, a change in the physical environment is the *sine qua non* of any action that alters the "environmental status quo" or causes a "significant degradation of some human environmental factor".

Courts have recognized that federal actions that do not change the status quo of the physical environment do not require the preparation of an EIS under NEPA.[3] For example, in *Ono v. Harper,* 592 F.Supp. 698, 701 (D. Hawaii 1983), local governmental authorities sued to block the

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[3] *See* Cases cited at note 2.

transfer of federally owned land to private individuals. The Court stated that "the focus of an [EIS] is the change in the physical environment caused by the federal action at issue" and dismissed the local authorities' NEPA claim because the authorities had not alleged that the transfer of title to the land would cause any change in the physical environment. *Id.* at 701. In *National Association of Property Owners v. United States,* 499 F.Supp. 1223 (D.Minn.1980), *aff'd,* 660 F.2d 1240 (8th Cir.1981), *cert. den.,* 455 U.S. 1007, 102 S.Ct. 1645, 71 L.Ed.2d 876 (1982), the district court rejected a challenge to the implementation of restrictions on recreational activities in a federally-designated wilderness area under the Boundary Waters Canoe Area Wilderness Act, based upon the claim that an EIS was required before the restrictions could be implemented. 499 F.Supp. at 1264-66. The Court held that implementation of the restrictions on activities in the wilderness area did not "significantly affect[] the quality of the human environment". *Id.* at 1265.

> [T]he Secretary's implementation of the Act enables no person to significantly affect the Wilderness. In fact, plaintiffs' major complaint is simply that Congress' mandate to the Secretary will effectively close portions of the Wilderness. . . . In essence, plaintiffs' claim is that the Department of Agriculture must prepare an EIS in order to leave nature alone. The Court is not moved by this argument.

Id.

Finally, the principle that NEPA applies only to those federal actions that may cause changes in the physical environment is supported by the corollary principle that NEPA does not require an agency to consider those potential effects of a proposed action that do not have a "reasonably close causal relationship [to] a change in the physical environment caused by the major federal action at issue". *Metropolitan Edison,* 460 U.S. at 774, 103 S.Ct.

at 1561. "[T]he Congressional concerns that led to the enactment of NEPA suggest[] that the terms 'environmental effect' and 'environmental impact' in [NEPA] be read to include a requirement of a reasonably close causal relationship between a *change* in the *physical* environment and the effect at issue." *Id.* at 774, 103 S.Ct. at 1561. Accordingly, any alleged effects of an agency's action that do not have a reasonably close causal relationship to a change in the physical environment caused by the agency's action are not within the scope of NEPA and can not form the basis of a NEPA claim.

In summary, whether the FWS should have prepared an EIS concerning its acquisition of the conservation easement depends upon whether the FWS's action is one that may "significantly affect[ ] the quality of the human environment", which, in turn, depends (1) whether the FWS's action may cause "a significant degradation of some human environmental factor" through a change in the physical environment, and (2) whether the allegedly significant effects of the FWS's action have a reasonably close causal relationship to any change in the physical environment caused by the FWS's action.

No Change in the Status Quo

The FWS's action in this case does not alter the environmental status quo; it does not cause any change in the physical environment.[4] Indeed the purpose of the acquisition of the easement is to foreclose *any* change in the

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[4] The FONSI issued by the FWS is also consistent with FWS regulations that categorically exclude from the NEPA review process

> [t]he acquisition of land in accordance with the Service's procedures, when the acquisition is from a willing seller, the acquisition planning process has been performed in coordination with the affected public and continuance of essentially the existing use is planned.

Department of the Interior Department Manual, 30 AM 2, Ex. 4, 516 DM 6 App. 1, 1.4A(4) (4/30/84).

physical environment of a particular wetland site. As the Court observed in *National Association of Property Owners*, NEPA does not require a federal agency to prepare an EIS whenever a reservoir is *not* built.

Under *State of Louisiana v. Lee*, the plaintiffs' burden in this case is to allege facts which, if true, would show that the FWS's action may cause "a significant degradation of some human environmental factor" through a change in the physical environment. The plaintiffs have failed to sustain this burden. The Court finds that when the FWS acquires an interest in land, such as a conversation easement, for the express purpose of preserving the land in its then-existing natural state, there is no reasonable possibility that such action may cause "a significant degradation of some human environmental factor" through a change in the physical environment.

Absence of Causal Connection

As indicated by the Court in *Metropolitan Edison*, NEPA requires that federal agencies consider only the effects of actions that have a reasonably close causal relationship to changes in the physical environment cause by those actions. The alleged "effects" of the FWS's action in this case are the "elimination" of a potential water supply-the Waters Bluff Reservoir-and the risk that the area served by the SRA will suffer water shortages in the future if the reservoir is not built. The plaintiffs allege that

> [a]cquisition of the Club easement and placement of that easement in the refuge system immediately injured the interests of the SRA and others of TWCA's members by eliminating the Waters Bluff Reservoir and setting in motion the effects that followed the elimination of that water supply.

The harmful effect that the plaintiffs claim the FWS's action will have on the environment is the result of what

the FWS's action *prevents* SRA and others from doing. Thus, the plaintiffs' claim presents the converse of the typical NEPA claim, which usually involves federal actions that initiate or permit development of natural resources. This case poses the novel question of whether NEPA requires consideration of the effects of federal actions when the effects of those actions are to *foreclose* development or use of some natural resource. The answer to this question is that NEPA does not require a federal agency to consider such effects since those effects result from what the federal action prohibits third parties from doing, and not from any "changes in the physical environment caused by the federal action" itself. The cases cited by SRA and TWCA to support their position are inapposite.

TWCA cites the case of *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir.1979) for the proposition that a change in the use of water resources caused by federal action requires the preparation of an EIS. In *Andrus*, the Department of the Interior decided to implement a program of marketing substantial amounts of water for industrial uses from two *existing* reservoirs. The diversion of water resources affected both the prospects of future industrial development and the amount of water available for irrigation downstream from the reservoir. The Court of Appeals held that the program was a "major federal action" under NEPA that required the preparation of an EIS. *Id.* at 851-52. *Andrus* can be readily distinguished from this case on the following basis.

In *Andrus*, the diversion of existing water supplies from two existing reservoirs had the effect of altering the amount of water available to agricultural users in order to allocate additional water resources for industrial users. The federal action in *Andrus* clearly had an effect that *changed the physical environment*. In this case, there is no diversion of any existing water resources, and there is no *change in the physical environment* as a result of the acquisition of the easement by the FWS.

The other cases cited by the plaintiffs for the proposition that federal actions that may create "water-supply problems" always require the preparation of an EIS all concern the potential effects that *commercial or industrial development* may have upon water supplies. *See e.g. City of Davis v. Coleman* 521 F.2d. 661 (9th Cir.1975). Yet commercial or industrial development can not take place absent some *change in the physical environment*. In *Coleman*, the federal action at issue was the proposed construction of a freeway interchange. The Court held in that case that the City of Davis had standing to prosecute a claim under NEPA since the city alleged that "the planned industrial development which the interchange will make possible may adversely affect the quality and quantity of the city water supply because of increased use and the danger of contamination by industrial wastes". *Id.* at 671. Commercial or industrial development and preservation are not synonymous under NEPA, and the FWS's acquisition of a conservation easement does not pose a "water-supply problem" that requires the preparation of an EIS.[5]

The alleged effects of the FWS's action in this case are analogous to the effects analyzed in *Metropolitan Edison* and are likewise beyond the scope of NEPA. In *Metropolitan Edison*, the Nuclear Regulatory Commission prepared an EIS concerning the relicensing of a nuclear-powered electrical generating station. Although the Commission considered the risk of a nuclear accident in its EIS, it decided not to consider the effect of this risk upon the psychological health of those who lived near the power plant. The Supreme Court observed that

> a *risk* of an accident is not an effect on the physical environment [and] is, by definition, unrealized in the

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[5] Another case cited by the plaintiffs, *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182 (9th Cir. 1982) does not address "watersupply problems", but instead holds that socioeconomic impacts of a federal action do not trigger NEPA's requirement of an EIS. *Id.* at 185-86.

> physical world. . . . We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Metropolitan Edison, 460 U.S. at 775, 103 S.Ct. at 1562. The same element of risk is present in the alleged effects of the FWS's action in this case.

One effect of the FWS's action is that as long as the easement remains in the National Wildlife Refuge System, SRA can not build the Waters Bluff reservoir. Although federal law provides certain procedures by which land may be released from the Refuge System, there is certainly a risk that SRA may not convince either the Congress or the Secretary of the Interior to relinquish the easement.[6] According to SRA, failing to build the Waters Bluff reservoir also creates a risk that SRA will face water shortages *in the future* that will adversely affect the economic welfare of the region that SRA serves. Yet a risk that the reservoir will never be built and that water shortages may occur in the future as a result is not an effect on the "physical environment". *Metropolitan Edison*, 460 U.S. at 775, 103 S.Ct. at 1562. There is no causal relationship between such speculative effects and any change in the physical environment caused by the acquisition of the easement. The element of risk inherent in the alleged effects of the FWS's action in this case "lengthens the causal chain beyond the reach of NEPA". *Id.* The Court finds that the effects of the FWS's action upon the plaintiffs are

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[6] No land that is a part of the Refuge System may be disposed of except by Act of Congress unless (1) the Department of the Interior and the Migratory Bird Conservation Commission determine that such lands are no longer needed for wildlife refuge purposes and the Department is paid the fair market value of the land, (2) the Department acquires other lands by exchange, or (3) such land is transferred pursuant to the terms of a cooperative agreement with a state or local government, by which agreement the land originally became part of the refuge system. 16 U.S.C. § 668dd(a)(3).

not within the scope of NEPA and can not form the basis of a NEPA claim.

Plaintiffs' Claims are Contrary to NEPA's Purpose

The FWS's EA reveals that the FWS adequately considered the fact that SRA wanted to acquire the Club's land for an alternative use, but the FWS nevertheless chose to acquire the easement. (AR. D p. 20-21). A careful analysis of the plaintiffs claims makes it abundantly clear that the plaintiffs simply object to the FWS's policy of acquiring conservation easements on wetland habitat where doing so poses a hindrance to the construction of reservoir projects. The plaintiffs' disagreement with the FWS is more akin to a political dispute over policy choices than a legal dispute over compliance with the procedural requirements of NEPA. *Cf. Foundation on Economic Trends v. Lyng*, 817 F.2d 882, 886 (D.C.Cir.1987). "Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. . .[t]he political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metropolitan Edison*, 460 U.S. at 777, 103 S.Ct. at 1563.[7] To permit the plaintiffs to use the provisions of NEPA to voice their policy objections to the FWS's actions and to hinder the FWS's attempts to fulfill its mandate from Congress would be contrary to the purposes of NEPA.

An analogous situation was presented in the case of *Sierra Club v. Marsh*, 692 F.Supp. 1210 (S.D.Cal.1988). In that case, a city applied for an injunction to prohibit the transfer of certain property from a private party to the United States pursuant to an agreement to settle a lawsuit. The city desired to develop the property in accordance

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[7] Legislation that would withdraw the Club Easement from the Refuge System is now pending before the Marine and Fisheries Committee in the House of Representatives.

with a local development plan. If transferred, the land would be used as a wildlife refuge, in mitigation for other land involved in the construction of a local highway/flood control project. The city passed an ordinance that imposed certain conditions upon the transfer which would have rendered the land useless as a wildlife refuge. *Id.* at 1215. The Court's discussion of the city's claim has particular relevance to this case.

> The federal government is trying to discharge its obligations under a high priority federal program to protect endangered species. A private landowner wants to donate the land to the government to effectuate these purposes. The City of Chula Vista has passed a local resolution in an attempt to stymie any transfer of the property which it believes does not serve the City's interests, which it has defined as development in strict accordance with its [local development plan].

Id. at 1215.

The Court found that the City's NEPA claim presented "the anomalous situation in which a municipality is trying to use federal environmental laws as a means of protecting a plan for desired local commercial and residential development". *Id.* at 1221. The Court rejected the city's NEPA claim on the grounds that "[i]t would be inconsistent with NEPA's purposes to allow the city to use NEPA to obstruct [the land transfer] which will protect endangered species." *Id.*

In this case, the FWS is attempting to carry out an express mandate from Congress to acquire and protect wetland habitat.

> It is the purpose of this Act to promote, in concert with other Federal and State statutes and programs, the conservation of the wetlands of the Nation . . . by (2) intensifying efforts to protect the wetlands of

> the Nation through acquisition [of wetlands] in fee, easements or other interests . . .

Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3901(b)(2).

This case also presents the anomalous circumstance of a governmental entity attempting to use the provisions of NEPA to protect its plan to *develop* natural resources in a manner that will unquestionably result in substantial changes in the physical environment. To permit the plaintiffs to use the federal environmental laws to this end and to hinder the FWS's efforts to carry out its directive from Congress would be contrary to the purposes of NEPA and contrary to the FWS's mandate under § 2(b)(2) of the Emergency Wetlands Resources Act.

Plaintiffs lack Standing under NEPA

To have standing to challenge the FWS's action under NEPA, the plaintiffs must show that they have been adversely affected by the FWS's action within the meaning of NEPA. *See Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 3185-86, 111 L.Ed.2d 695 (1990). In other words, the plaintiffs must establish that the injury of which they complain "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis of [the] complaint". *Id.* 110 S.Ct. at 3186. The Court's finding that the plaintiffs' claims are not within NEPA's scope and that they are contrary to NEPA's purpose compels the conclusion that the plaintiffs lack standing to assert a claim under NEPA. The plaintiffs' interest in constructing a reservoir is unquestionably an interest that is *subject* to the provisions of NEPA, but it is not an interest that NEPA was designed to protect.

Summary

The Court finds that the FWS's decision not to prepare an EIS concerning the easement acquisition was not ar-

bitrary and capricious; the FWS adequately considered all relevant factors, and there is no clear error in its judgment. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at ___, 109 S.Ct. at 1861. The FONSI issued by the FWS is correct since there is "no reasonable possibility" that the FWS's action will cause "a significant degradation of some human environmental factor" through a change in the physical environment. *State of Louisiana v. Lee*, 758 F.2d at 1085. Furthermore, the plaintiffs' claims are not within the scope of NEPA because (1) the alleged effects of the FWS's action lack the requisite causal relationship to any change in the physical environment caused by the acquisition of the easement, *Metropolitan Edison*, 460 U.S. at 773, 103 S.Ct. at 1561; and (2) the plaintiffs' claims are an improper attempt to use the provisions of NEPA to hinder the FWS in carrying out its mandate from Congress to acquire and preserve wetland habitat. For these same reasons, the plaintiffs also lack standing to assert a claim under NEPA, since the plaintiffs' alleged injury is not within the "zone of interests" that NEPA was designed to protect.

IV. ADEQUACY OF THE EA

As an alternative to their contention that the FONSI is incorrect, the plaintiffs contend that the EA prepared by the FWS is inadequate in several respects and that the case should be remanded to the FWS for further consideration. The Court has carefully reviewed the EA in light of the administrative record and the applicable law and finds that the EA is adequate.

Preparation of an EA is the proper procedure for an agency to utilize in determining whether to prepare an EIS concerning a proposed action. *Vieux Carre Property Owners, Residents and Associates, Inc. v. Pierce*, 719 F.2d 1272, 1281 (5th Cir.1983); 40 C.F.R. § 1508.9(a)(1). Federal agencies have a duty to prepare a reviewable administrative record, and a court must review the reasonableness

of the agency's determination on the basis of the information available to the agency at the time the EA was prepared. *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d at 433. NEPA does not mandate any particular result of the review process but only requires that federal agencies take a "hard look" at the environmental consequences of a proposed action before such action is undertaken. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, ___, 109 S.Ct. 1835, 1846, 104 L.Ed.2d 351 (1989). As long as an agency adequately considers the consequences of its proposed action, NEPA does not prohibit the agency from concluding that the benefits of its action outweigh its costs. *Id.* "NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.*

Consideration of the Need for Action

In this case, the FWS selected the land owned by the Club for possible acquisition on the basis of the findings of a biological survey conducted at the FWS's request. (AR. A). The survey identified the Club's land as a particularly valuable site of wetlands habitat, habitat that numerous studies had indicated was rapidly diminishing. (AR. A-IV). The FWS used the findings of the biological survey in compiling the Concept Plan and Land Protection Plan. (AR. C, p. 3). The FWS's reliance on the survey data to evaluate the importance of acquiring the conservation easement on the Club land was clearly reasonable.

Consideration of Water-Supply Issues

Both the survey and the Concept Plan identified planned reservoir projects as a principal source of conflict with preservation of wetland sites in eastern Texas. (AR. B, p. 133). The survey specifically excluded wetlands sites that might conflict with planned reservoir projects. (AR. A-II). In evaluating the extent of the conflict between wetlands sites and planned reservoir projects, the FWS relied upon the 1984 Texas Water Plan developed by the Texas Department of Water Resources. (AR. H). The FWS's reli-

ance on the Water Plan's data and projections concerning future reservoir projects and water supplies was reasonable in light of the fact that the Water Plan is 'designed to be a state-wide comprehensive estimation of the future water demands and supplies for all of Texas over a 50-year planning period". (Amicus Brief of the State of Texas at p. 8).

Although Waters Bluff was not listed as a planned reservoir in the Water Plan, the FWS nevertheless reviewed the SRA's Master Plan Update which contained SRA's own water supply projections to support its conclusion that Waters Bluff is a feasible and necessary reservoir project. (AR. D, p. 13, 50; AR. L—N). SRA's Master Plan Update relied on the Water Plan to provide "some of the basic data sources utilized in the projections of future basin water requirements". (AR. M, p. 1-6). The record indicates that the FWS fully considered the available data on future water supply needs of the Sabine River Basin contained in both the Water Plan and SRA's Master Plan Update. The final EA issued by the FWS contains an adequate discussion of the water-supply issues raised by SRA in its opposition to the proposed easement. (AR. D, p. 12-16).

There is no indication that the FWS failed to consider pertinent data in reaching its conclusion. The plaintiffs merely disagree with the FWS's interpretation of the available data and the conclusion that the FWS reached. Yet "the mere existence of differing opinions does not make [the agency's] decision erroneous." *State of Louisiana v. Lee,* 758 F.2d at 1085. This Court can not conclude that the FWS's review of the water-supply issues raised by SRA was inadequate or that the FWS's conclusion was unreasonable, arbitrary or capricious.

Consideration of Alternatives

The plaintiffs contend that the FWS failed to adequately consider alternatives to acquisition of the easement. The FWS considered four alternatives: (1) taking no action to

preserve the Club's land, (2) establishing a refuge in conjunction with the Waters Bluff project, (3) acquiring the Club's land in fee simple, and (4) acquiring a less-than-fee-simple interest in the Club's land. (AR. D, p. 20-25). SRA faults the FWS for not considering the acquisition of high priority wetland habitat outside the area of SRA's Waters Bluff project and for failing to adequately consider establishing a refuge in conjunction with the Waters Bluff project.

Once an agency adequately addresses alternatives to its proposed action, "the decision of which alternative to follow is within the agency's discretion". *South Louisiana Environmental Council, Inc. v. Sand,* 629 F.2d 1005, 1017 (5th Cir.1980). "[T]he range of alternatives that reasonably must be considered decreases as the environmental impact of the proposed action becomes less and less substantial". *Olmsted Citizens for a Better Community v. United States,* 793 F.2d 201, 208 (8th Cir.1986). Although consideration of some range of alternatives is essential to any environmental assessment, it makes little sense to fault an agency for failing to consider "more environmentally sound alternatives to a project which it has [*properly*] determined, through its decision not to file an impact statement, will have no significant environmental effects anyway". *Id.; see also City of New York v. United States Dept. of Transportation,* 715 F.2d 732, 744 (2nd Cir.1983), *cert. den.,* 465 U.S. 1055, 104 S.Ct. 1403, 79 L.Ed.2d 730 (1984). Since the FONSI concerning acquisition of the easement is correct, the range of alternatives considered by the FWS was adequate.

The FWS considered and rejected the no-action alternative for the simple reason that doing nothing to preserve the highest priority site of wetland habitat would not be consistent with the FWS's preservation efforts and would likely permit the irretrievable loss of the habitat. (AR. D, p. 21). Similarly, establishing a refuge in conjunction with the Waters Bluff project was rejected because that alter-

native would not prevent destruction of the wetland habitat. (AR. D, p. 20-21). The FWS also concluded that any area set aside for refuge purposes would be of inferior quality. (AR. D, p. 20-21). This conclusion is supported by the report issued by the Texas Parks and Wildlife Department which suggested that wetland sites established in conjunction with reservoir projects are of only "marginal" value to waterfowl populations. (AR. K-I-7, p. 18-19). Acquisition of the Club's land in fee-simple was not an available alternative because the Club was not willing to sell, and the FWS was operating under budgetary constraints that made no-cost acquisitions especially attractive. (AR. D, p. 23-24). The Court finds that the FWS's consideration of these alternative courses of action was adequate and reasonable.

Consultation with Other Agencies

The plaintiffs contend that the FWS failed to properly consult with other federal and state agencies during the NEPA review process. This claim is not supported by the evidence in the record, and it is based on the erroneous assumption that NEPA mandates inter-agency consultation *before* a draft EA is prepared.

Although the applicable regulations do not address the timing of inter-agency consultation in the preparation of an EA, the regulations do provide that after preparing a draft EIS and before preparing a final EIS the agency shall obtain the comments of other Federal agencies and request the comments of appropriate State and local agencies. 40 C.F.R. § 1503.1(a)(1, 2). The regulations further provide that an agency shall respond to such comments. *Id.* at § 1503.4(a). There is nothing in NEPA or the applicable regulations to suggest that the timing of consultations should be any different when an agency prepared a draft EA as opposed to a draft EIS.

The record indicates that the FWS circulated its draft EA to all appropriate federal and state agencies. (AR. D,

p. 49-50; AR. G- 84). The FWS then received a number of written comments both critical and supportive of its proposed action. (AR. K). The FWS also received oral and written comments during the public meeting concerning the easement. (AR. I). In response to these comments, the FWS revised its draft EA to include a discussion of the alleged controversial aspects of its acquisition of the easement. (AR. P, p. iii; AR. D, p. iii). While the draft EA contained only a brief reference to SRA's Waters Bluff project, the final EA contains a responsive discussion of the water-supply issues raised by SRA. (AR. P, p. 9; AR. D, p. 12-16). The FWS also revised the EA to address the alternative of establishing a refuge in conjunction with the Waters Bluff project. (AR. P, p. 11-12; AR. D, p. 20). Thus, the record demonstrates that the FWS considered and responded to the comments raised in opposition to the easement.[8] The FWS's action was consistent with the requirement that an agency involve the public as well as other government agencies in preparing an EA. *See* 40 C.F.R. § 1501.4(b). That the FWS chose not to agree with the objections raised by SRA and others does not undermine the adequacy of the FWS's NEPA review.

30-Day Comment Period

A related issue raised by the plaintiffs is the FWS's alleged failure to provide a 30-day comment period after the FONSI was issued. *See* 40 C.F.R. § 1501.4(e)(2). This regulation mandates such an additional comment period if the agency's proposed action (1) is, or is closely similar

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[8] The case cited by the plaintiffs in support of their contention is readily distinguishable. In *Simmans v. Grant,* 370 F.Supp. 5, 18-19 (S.D. Tex.1974), the Court found that the federal agency had failed to contact, or to consider the views of, several other agencies in preparing an EA and a FONSI and that there had been little or no opportunity provided for the public to express its views on the agency's proposed action. The record in this case reveals no similar deficiency in the FWS's NEPA review process.

to, action that "normally requires" the preparation of an EIS under regulations adopted by the agency, or (2) "the nature of the action is one without precedent". § 1501.4(e)(2)(i-ii).

Whether the acquisition of the conservation easement is or is similar to an action that "normally requires" the preparation of an EIS under Department of Interior regulations is the subject of somewhat conflicting provisions in those regulations. On the one hand, the regulations provide that an FWS proposal to establish "new refuges, fish hatcheries, or research stations and major additions to existing installations" will "normally require the preparation of an EIS". Department of the Interior Department Manual, 516 DM 6, App. 1, 1.3A(1). The regulations further provide that if an EIS is not prepared for such proposals, "an EA will be prepared and handled in accordance with § 1501.4(e)(2)". *Id.* at 1.3B. On the other hand, the regulations categorically exclude from the NEPA process "acquisition of land in accordance with the Service's procedures, when acquisition is from a willing seller, the acquisition planning process has been performed in coordination with the affected public and continuance of essentially the existing use is planned". *Id.* at 516 DM 6, App. 1, 1.4A(4). The resolution of this apparent conflict lies in a common-sense interpretation of these provisions.

Although the effect of the FWS's actions in this case was to create a "new refuge", the other types of actions described in section 1.3A(1) are sufficiently dissimilar to the FWS's action in this case to support the conclusion that the acquisition of a conservation easement by the FWS is not the "establishment of [a] new refuge [ ]" for purposes of section 1.3A(1). "Establishment of new . . . fish hatcheries, research stations and major additions to existing installations" involves more than the mere acquisition of a property interest such as a conservation easement. This interpretation of section 1.3A(1) is thus fully consistent with section 1.4A(4)'s categorical exclusion

of land acquisitions by the FWS from a willing seller where a continuation of the existing use of the land is planned—an apt description of the FWS's action in this case. That the FWS prepared an EA concerning the easement acquisition does not undermine this conclusion because the regulations provide that an EA "may be prepared on any action [even those covered by a categorical exclusion] at any time in order to assist planning and decision-making". *Id.* at 516 DM 3.2; *see also* 40 C.F.R. § 1508.4. Accordingly, the FWS's action in this case was not one that would normally require the preparation of an EIS under regulations adopted by the FWS, nor was it similar to such an action.

The 30-day comment period must also be provided if "the nature of the proposed action is one without precedent". 40 C.F.R. 1501.4(e)(2)(ii). Whether the "nature" of the FWS's action is "without precedent" is largely a function of the definition one assigns to the term "nature". If, as the plaintiffs argue, the "nature" of the FWS's action is the acquisition of a conservation easement in an area where construction of a reservoir is planned, then the action is "without precedent" since the FWS admits that no other conservation easements have been acquired in an area where a reservoir project is planned. Yet the common understanding of the term "nature"—the essential character of something—illustrates that the FWS's action was not "without precedent". The essential character of the FWS's action is the acquisition of a conservation easement under circumstances that pose a conflict with another party's desired uses of the same land. The "nature" of the FWS's action is not "without precedent" since the FWS has heretofore acquired similar easements under circumstances that also posed a conflict with other potential uses of the same land. (AR. D, p, iii). Because the FWS's acion was not without precedent, no additional comment period under 40 C.F.R. § 1501.4(e)(2) was required.

Finally, even if the Court were to find that the 30-day comment period applied to the FONSI in this case, the plaintiffs have failed to identify any *additional* relevant information that they or any other party would have provided the FWS. Accordingly, there is nothing to suggest that the absence of the additional comment period deprived the FWS of relevant information such as would undermine the reasonableness or adequacy of the FWS's NEPA review process.

Consideration of Controversy, Precedent and Cumulative Effects

The plaintiffs also contend that the FWS failed to consider the extent of the controversy surrounding its action, the precedential nature of the action, and the cumulative effects of acquiring additional conservation easements. This claim is based on regulations that provide that in determining whether a proposed action is "significant" under NEPA, the "intensity" or severity of the environmental "impact" of the proposed action must be considered. 40 C.F.R. § 1508.27(b). Among the several factors listed for consideration in determining "intensity" are the degree to which the effects on the quality of the human environment are likely to be highly controversial", "the degree to which the action may establish a precedent for future actions with significant effects", and whether the action is related to other actions with individually insignificant but cumulatively significant impacts". *Id.* at § 1508.27(b)(4, 6, 7).

The only "effects" or "impacts" that must be considered under NEPA, however, are those that have a reasonably close causal relationship to a *change* in the *physical* environment caused by the federal action at issue. *Metropolitan Edison,* 460 U.S. at 773, 103 S.Ct. at 1561. The Court has already found that the alleged effects of the FWS's action in this case—interference with SRA's plans to build Waters Bluff and a risk of future water shortages—lack the requisite causal relationship because acqui-

sition of the easement *will not* cause any change in the physical environment. Since the alleged effects of the FWS's acquisition of the easement are beyond the scope of NEPA, the factors listed in § 1508.27(b) are of no legal significance to this case, because such factors are only relevant to an evaluation of whether the "effects" of a proposed action are "significant" under NEPA.

The case cited by the plaintiffs, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir.1985) does not compel a contrary finding. That case discussed "precedent for future actions with significant effects" in the context of actions taken by an agency that would *encourage* further commercial or industrial development. *See Id.* at 879. Such is not the case here. To the extent that the acquisition of this easement sets a precedent for acquisitions of additional conservation easements by the FWS, such future actions would not have "significant effects" under NEPA because the acquisition of such easements does not cause any "change in the physical environment".

Summary

Although the plaintiffs disagree with the FWS's evaluation of the data compiled in the NEPA review process as well as the conclusions reached by the FWS, such disagreement is not sufficient to raise a NEPA claim. The purpose of NEPA is to ensure that federal agencies do not make uninformed, as opposed to "unwise", decisions that affect the environment, and so long as an agency adequately considers the consequences of its proposed action, NEPA does not prohibit the agency from concluding that the benefits of its action outweigh its costs. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at ___, 109 S.Ct. at 1846. The record shows that in this case, the FWS adequately considered the environmental consequences of its action and that is all that NEPA requires.

V. CONCEPT PLAN NOT SUBJECT TO NEPA

The plaintiffs also contend that the FWS should have prepared an EIS concerning the Preservation Program. Unless the Preservation Program is a "proposal" for a major federal action, NEPA does not require the preparation of an EIS. *See Kleppe v. Sierra Club,* 427 U.S. 390, 399, 96 S.Ct. 2718, 2725 (1976); *Foundation On Economic Trends v. Lyng,* 817 F.2d 882, 885-86 (D.C.Cir.1987). "The mere contemplation of certain action is not sufficient to require an impact statement." *Fritiofson v. Alexander,* 772 F.2d at 1240. Under 40 C.F.R. § 1508.23, a

> [p]roposal exists at the stage in the development of an action when an agency . . . has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects [of the proposed action] can be meaningfully evaluated.

After carefully reviewing the Preservation Program as set forth in the FWS's Concept Plan document (AR. B), the Court finds that the Preservation Program is not a "proposal" for major federal action under NEPA.

The plaintiffs characterize the Concept Plan document as a proposal for a series of land acquisitions by the FWS. The alleged effect of this proposal is, once again, the "elimination" of potential reservoir sites. As the Court discussed earlier at length, such effects are not within the scope of NEPA because of the absence of any causal connection between acquisition of conservation easements and any changes in the physical environment. For this reason alone, the plaintiffs can not maintain a NEPA claim concerning the Preservation Program. Additionally, a plain reading of the Concept Plan demonstrates that it is nothing more than a preliminary study document that the FWS intends to use as a basis for making specific proposals for land acquisitions in the future.

The FWS's guidelines concerning land acquisitions explain that a concept plan such as the one prepared for the Preservation Program is only a preliminary step in the FWS's decision making process concerning land acquisitions. FWS Realty Manual, 2 REM 2.10-11).[9] Even after a concept plan is prepared, land acquisitions may be rejected after the FWS conducts further study and planning. *Id.* It is only after such further study and planning that the FWS prepares a "decision document" concerning a specific proposal for land acquisition, and the guidelines provide that such decision documents shall be prepared in accordance with NEPA. Thus, the Preservation Program Concept Plan is not a "proposal" under NEPA, and the statements contained in the Preservation Program Concept Plan support this conclusion.

The majority of the Preservation Program Concept Plan document is simply informational in nature. The Concept Plan contains an extensive discussion of the types of flora and fauna found in bottomlands habitat. (AR. B, pp. 29-82). There is also an extensive review of the natural resources and socio-economic features of the East Texas area encompassing bottomlands habitat. (AR. B, pp. 83-123). The statements contained in the document that relate directly to acquisition of bottomlands habitat show that the Concept Plan does not contain a "proposal" for land acquisitions.

> In the Concept Plan, the FWS states that [t]he purpose of this program is to *identify and seek methods for preserving* as much of the remaining bottomlands habitats of east Texas as possible . . . A total of 62 areas of widely varying quality have been identified . . . *Not all of these sites are being recommended for preservation, and other areas may be listed as additional information becomes available.*

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[9] Appendix 6, Federal Defendants' Motion for Summary Judgment.

(AR, B, p. 4).

The Concept Plan also recites that "[a] stated acreage and policy objective for [preserving] botto mlands in Texas is very difficult, *because of the infancy of the program and the complexity of the biological and soc iological factors involved.*" (AR. B, pp. 3-4). Although th e Concept Plan divides areas of bottomlands habitat into six priority groups, the Concept Plan specifies that the cat egories may be subsequently reviewed and revised by th e FWS and other parties. (AR. B, p. 22). Finally, the FWS states in the Concept Plan that it has only a "m inimal amount" of information concerning the owners of la nds that encompass bottomlands habitat, and that only after the FWS contacts landowners will a "detailed preservation plan" be prepared for a specific site. (AR. B, p. 22).

These statements belie the plaintiffs' assertion that the Concept Plan is a "proposal" for federa l action. The Concept Plan does not identify which site s will be acquired by the FWS, nor does it identify whi ch of the various suggested alternative methods of pres ervation might be used to acquire any particular site or category of sites. Thus, there are no discernible "effects" of any particular acquisition or series of acquisitions that can be meaningfully evaluated under NEPA. Accordingly, the Court finds that the FWS was not required to pre pare an EIS concerning the Preservation Program, sinc e the Program is not a "proposal" for major federal acti on.

VI. NO VIOLATION OF 16 U.S.C. § 460k OR § 742a

In its Original Complaint, SRA alleged that the terms of the easement restricting public acce ss to the Club's property violated provisions of the Fish and Wildlife Act, 16 U.S.C. § 742a, and the Refuge Re creation Act, 16 U.S.C. § 460k. Not only do these statute s fail to provide any basis for SRA's claims, these statute s specifically authorize the FWS's action in this case.

The Fish and Wildlife Act provides in part that

> The Secretary of the Interior is authorized to accept any gifts, devises, or bequests of real or personal property . . . for the benefit of the United States Fish and Wildlife Service . . . Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude, *if such terms are deemed by the Secretary to be in accordance with law and compatible with the purpose for which acceptance is sought.*

16 U.S.C. § 742f(b)(1).

The Refuge Recreation Act grants the Secretary similar discretion to permit or restrict public use of refuge areas, and to accept donations of real property under such restrictions as the *Secretary may deem to be compatible with the purposes of the refuge areas.* 16 U.S.C. § 460k. SRA has failed to demonstrate that the FWS's acceptance of the easement under terms restricting the public's access to what remains privately owned land was unreasonable, arbitrary or capricious.

VII. SUMMARY

For the foregoing reasons, the Court finds that (1) the FWS's FONSI concerning the acquisition of the conservation easement is correct because there is "no reasonable possibility" that the FWS's action will cause "a significant degradation of some human environmental factor" through a change in the physical environment; (2) the alleged effect of the FWS's action—"elimination of a potential reservoir site"—is not within the scope of NEPA because there is no causal relationship between the alleged effect and any change in the physical environment caused by the acquisition of the easement; (3) the plaintiffs lack standing under NEPA to challenge the FWS's acquisition of the easement; (4) the EA prepared by the FWS was adequate; (5) NEPA does not require the FWS to prepare an EIS

concerning its Preservation Program, as set forth in the Concept Plan, because the Program is not a "proposal" for a major federal action; and (6) the FWS did not violate the Fish and Wildlife Act or the Refuge Recreation Act by agreeing to accept the easement under terms that restrict the public's access to the Club's property. Therefore, it is

ORDERED the Motions for Summary Judgment filed by the plaintiff Sabine River Authority and plaintiff-intervenor Texas Water Conservation Association are DENIED. It is further

ORDERED the Motions for Summary Judgment filed by the defendants United States Department of Interior and United States Fish and Wildlife Service, Little Sandy Hunting and Fishing Club, and defendant-intervenors Sierra Club and National Audubon Society are GRANTED, and all of the plaintiffs' claims against all of the defendants are DISMISSED WITH PREJUDICE.

APPENDIX C

ORDER

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-4761

SABINE RIVER AUTHORITY,
Plaintiff-Appellant,

and

TEXAS WATER CONSERVATION ASSOCIATION,
Plaintiff-Intervenor- Appellant,

versus

U.S. DEPARTMENT OF INTERIOR, ET AL.,
Defendants-Appellees,

and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY,
Defendants-Intervenors-Appellees.

U.S. Court of Appeals,
FILED
Mar 4 1992,

Gilbert F. Ganucheau
Clerk

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING

(March 4, 1992)

Before GOLDBERG, GARWOOD, Circuit Judges and BUCHMEYER*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Irwin L. Goldberg
United States District Judge

Clerk's Note:
See FRAP and Local Rules 41 for Stay of the Mandate.
RHG-4

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* District Judge for the Northern District of Texas, sitting by designation.

APPENDIX D

THE NATIONAL ENVIRONMENTAL POLICY ACT

(42 USC 4321 et seq.; amended by PL 94-52, July 3, 1975; PL 94-83, August 9, 1975)

Purpose

Sec. 2. (§ 4321) The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Title I

Declaration of National Environmental Policy

Sec. 101. (§ 4331)(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social,

economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and each person has a responsibility to contribute to the preservation and enhancement of he environment.

Sec. 102 (§ 4332) The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies

set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such state-

ment and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

> (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
>
> (ii) the responsible Federal official furnishes guidance and participates in such preparation,
>
> (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
>
> (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further,

this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. (§ 4333) All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. (§ 4334) Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of

environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. (§ 4335) The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

Title II

Council on Environmental Quality

Sec. 201. (§ 4341) The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. (§ 4342) There is created in the Executive Office of the President a Council on Environmental Quality

(hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203. (§ 4343) (a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)), the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204. (§ 4344) It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to ana-

lyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 (§ 4345) In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. (§ 4346) Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 USC 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 USC 5315).

Sec. 207. (§ 4346a) The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208. (§ 4346b) The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209. (§ 4347) There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

APPENDIX E

United States Department of the Interior

BUREAU OF RECLAMATION
SOUTHWEST REGION
COMMERCE BUILDING, 714 S. TYLER, SUITE 201
AMARILLO, TEXAS 7????- ????
IN REPLY
REFER TO:

770

JAN 16 1987

Memorandum

To: Regional Planning Officer

From: Chief, Environmental Branch

Subject: Comments on Final Environmental Assessment and Decision Document, Proposed Land Protection, Little Sandy Hunting and Fishing Club Easement

It appears that the Fish and Wildlife Service (FWS) may have made several errors in judgment and writing that they may regret if some agency should initiate legal action against FWS.

Section 1501.4(e) of the National Environmental Policy (NEPA) Regulations addresses procedures for preparing a Finding of No Significant Impact. Note especially part 2 which recommends distributing the draft environmental assessment (EA) and FONSI for 30 days prior to making a final determination to file a FONSI or an environmental impact statement (EIS). Section 2, part (e) is as follows:

> § 1501.4 Whether to prepare an environmental impact statement
>
> (e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis

of the environmental assessment not to prepare a statement.

(1) The agency shall makes the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

This action sets a precedent in south Texas that could eventually result in adverse impacts to several proposed water supply lakes. It is the first of 62 bottomland areas proposed for acquisition and preservation in Texas by the FWS.

This action has generated considerable controversy which resulted in the necessity for a public hearing. At the public hearing, several hundred people were in attendance and there were 66 speakers (20 against, 43 for, and 3 undecided) (see page 49). There was also an unidentified number of letters that were about equal in number for and against the easement.

Several State water agencies expressed serious concern over the precedent this action sets and the possible adverse

impact upon future water supply lakes that similar actions by the FWS could have.

It would seem that in the absence of a decision to prepare an EIS, the FWS should have at a minimum complied with Section 1501.4(e)(2).

The cover letter to this Little Sandy Hunting and Fishing Club (LSHFC) easement states that a speedy decision was necessary in order to determine whether or not to accept the easement donation before the option to do so expired on December 27, 1986, and that the FONSI was finalized on December 12, 1986, and the decision to accept the easement was made on December 16, 1986. Although the FONSI was signed on December 12, the FONSI was not sent out to the concerned public until December 29, 1986. This should not be a reason to short circuit the NEPA Regulations or to delay distribution.

NEPA documents should be a fair and impartial document which displays the facts and the alternatives in an impartial manner with a minimum of judgmental value statements. Section 1502.1 states:

> § 1502.1 Purpose
>
> ". . . . It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analysis . . . ."

Section 1502.14 (alternatives including the proposed action), states:

> § 1502.14 Alternatives including the proposed action
>
> In this section agencies shall:
>
> (a) Rigorously explore and objectively evaluate all reasonable alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.

This EA does not appear to meet these requirements. It does appear to be a biased document frequently lacking in data and evidence, but rich in negatives and superlatives. For instance, pages 20 and 21 reject the Waters Bluff Reservoir Alternative. This slightly more than one page discussion contains the following negative words. "will not protect the Middle Sabine bottom site," "reservoir cannot possibly posess the high quality habitat that exists on Little Sandy Club," "It is unknown if the reservoir will ever be constructed, and if it is determined to be a viable project, when it will be constructed. Preliminary design studies do not discuss specific sites or possibilities of mitigation for bottomland hardwood losses, and establishing a refuge in conjunction with the reservoir is not mentioned," "FWS needs to protect these important areas as soon as possible," "FWS cannot wait for a reservoir which may or may not ever be constructed and will not replace the high quality bottomland hardwoods of Little Sandy Club."

Page 30 addresses bottomland hardwoods and uses the superlatives, "The diverse flora of the bottomland ecosystem, a result of numerous abiotic factors, support an equally diverse fauna," "Diversity of most animal groups is greater in bottomlands," "Because of diversity of floral species and abundance of food resources, including bountiful crops of most," "One of the most important values of bottomland hardwoods and associated wetlands is the waterfowl species," "A large number of other wildlife species are preserved." "Bottomlands of eastern Texas contain important wintering habitat .... and producing and rearing habitat," "Historically, the area has played a key role in sustaining Continental and Central Flyway waterfowl populations," "East Texas and southeastern Oklahoma bottomlands represent the only significant habitat of the wood duck and perhaps the most important wintering area for the mallard in the Central Flyway," "FWS has acknowledged the importance of these East Texas floodplains forests," and "The region is of primary importance to two waterfowl species."

Although Reclamation has provided the FWS with reports on the Big Sandy and Waters Bluff Reservoir alternatives and other projects in the area, the FWS did not reference any of these reports.

Although NEPA Regulations do not specify an EA format, the format is usually the same as for an EIS including Section 1503.4 (Responses to Comments). Part (b) states:

> § 1503.4 Response to Comments
>
> (b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous) should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

Reclamation's National Environmental Policy Act Handbook, in the section on environmental assessments, agencies and persons consulted, states:

> This section will contain any letters of comment received, based on circulation of the assessment or comments expressed in public meetings.

The LSHFC assessment has a Part VII, Consultation and Coordination, which briefly addresses oral and written comments, but these comments are not attached. Selected responses to these comments have been provided. There is no way that the reader can determine the issues or the significance of these issues or what persons or agencies expressed concern.

NEPA Section 1508.7 addresses cumulative impacts:

> § 1508.7 Cumulative impact
>
> "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

The Corps of Engineers has recently been mandated by environmental interests to do a cumulative impact statement on the deepening and widening of the Houston Ship Channel. This mandate includes projects other than the Corps dredging project which are being planned or constructed within the bay's watershed by other state and federal agencies.

As expressed in letters of comments and oral presentations, there has been considerable concern over the precedent being set by the Texas Bottomland Hardwood

Preservation Program (TBHPP) and the LSHFC easement. The FWS has gone to great length in this EA to dismiss these precedent concerns by stating National Policy and ignoring Texas bottomland acquisition concerns. This program has the potential to adversely impact on several proposed water supply reservoirs but no cumulative impact statement for the TBHPP has been prepared.

Specific Comments

Page ii.

Paragraph D, Important Physical and Socioeconomic Data Related to the Proposed Acquisition. The FWS appears to have missed the important socioeconomic issue. The issue is not the size of the area is 3,802 acres which has been managed as a hunting club for nearly 100 years and that the major source of income in the area is oil and gas, agricultural products, and timber. The important issue is water supply planning, population and industrial growth projections, and how this easement could potentially impact upon future population and industrial growth.

Paragraph E, Important Environmental Consequences Resulting from the Proposed Action. This paragraph only addresses the fact that the land will continue to remain in private ownership and the property owner will pay any property taxes. NEPA Sections 1508.8 "Effects," 1508.14 "Human Environment," and 1508.27 "Significantly" carefully include economic and social impact considerations. These sections follow:

> § 1508.8 Effects.
>
> "Effects" include:
>
> (a) Direct effects, which are caused by the action and occur at the same time and place.
>
> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.

Indirect effects may include changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.14 Human Environment

"Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require prepration of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.27 Significantly

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the

locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumula-

tively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Page iii

Paragraph F. The Alternatives Analyzed. Although the Waters Bluff Reservoir has been identified as an alternative reasonably likely to occur, the FWS continues to refuse to recognize it as an alternative.

Page 1

Paragraph 2. This paragraph does not justify the possible short-circuiting of NEPA Regulations.

Paragraph 3, Last sentence. There is no evidence that this easement will "prevent destruction of wildlife habitat." Our information concerning the LSHFC indicates that it is not likely that the club will change its policies in the foreseeable future with or without the federal non-development easement. In fact, it is unlikely that the club would

have agreed to enter into this easement if it conflicted with their long-rage plans. The high- value lands presently exist because of the club's waterfowl management activities.

Page 7, Paragraphs 3 and 4. There is no evidence that any type of NEPA cumulative impact compliance has been carried out on the possible impacts of the acquisition of these 62 areas.

Page 12, Last Paragraph, last sentence. The Waters Bluff Reservoir is one of the alternatives considered by the Bureau as a part of the Texas Big Sandy Project.

Page 13, First Paragraph, next to last sentence. The Bureau of Reclamation does not have an authorized Big Sandy Reservoir. It is, at this time, the preferred alternative for the Texas Big Sandy Project.

Pages 15 and 16. These two pages appear to be a concentrated effort to discredit Waters Bluff Reservoir. The FWS should present factual information based on available data and information. Judgmental statements and statement no supported by fact should not be made. The Toledo Bend Reservoir is used as the primary justification for not needing Waters Bluff. Toledo Bend is discussed in four separate, unrelated paragraphs in these two pages. This seems to present a biased point of view.

Page 15, Last Paragraph. The Bureau is not familiar with the Waters Bluf Feasibility Study.

Page 16, First Full Paragraph. It is interesting to note that, prior to the preparation of this EA, the FWS has expressed concern over the Little Cypress Reservoir because of the high value bottomland timber that it would inundate.

Page 17, First Full Paragraph. This paragraph, when it is to the FWS's advantage, recognizes the conflict between reservoir construction (three of ten reservoirs proposed for

the Upper Sabine Reservoir) when they have potential bottomland hardwood losses, but refuses to recognize that the Texas Bottomland Hardwood Preservation Program could also adversely affect these three reservoir and other reservoirs that could be adversely impacted by this program. On page 20, when rejecting Waters Bluff Reservoir, the FWS states, "It is unknown if the reservoir will ever be constructed, and if it is determined to be a viable project, when it will be constructed." However, if one of these three referenced reservoirs is planned for construction, the FWS would expect the water management and development agency to consider the conflicting bottomland hardwood sites as viable projects and would demand that the project be stopped or appropriately mitigated.

Page 17, Paragraph 3. This paragraph would read more correctly if the first sentence were changed from "FWS is coordinating with both the Bureau of Reclamation . . . ." to "The Bureau of Reclamation is coordinating with and paying the FWS to participate in the planning of the Big Sandy project."

Page 21

Paragraph 2. Section 1502.14 of the NEPA Regulations requires that all reasonable alternatives be rigorously explored and objectively evaluated and that all reasonable alternatives not within the jurisdiction of the agency be explored. It appears that the letters of comment recommended two alternatives that the agencies recognized as viable (1) construct WBR and include a waterfowl management area available to the public and (2) investigate possible access of bottomland hardwoods which would not preclude future construction of WBR. These two alternatives should have been considered as viable alternatives under Section 1502.14.

A. *No Action.* The "No Action" alternative as presented here presents a picture of a club whose finances and future is uncertain. Of particular concern is the sentence which

states, "A loss or reduction in waterfowl hunting opportunities and other circumstances, such as increased taxes, feasibility of economic development, change in club membership, the need for additional capital that could be obtained by logging the bottomlands, will probably result in the loss of this land as wildlife in the future." This may not be an accurate "No Action" description. Page ii, paragraph D states that the land has been utilized as a hunting club for nearly 100 years. Newspapers have described the LSHFC as an exclusive club with a maximum of 84 members, a 35- year waiting list, and membership fees of $60,000 to $80,000. Management of this area, particularly the flooding of live trees during the fall migration season makes this area desirable for waterfowl. It does not appear that a hunting club which has been in existence for nearly 100 years, has an exclusive membership of influential people, and a 35-year waiting list, is in financial or other trouble.

In the Bureau comments of September 29, 1986, it was suggested that a more likely reasonable "No Action" alternative would be the construction of WBR, acquisition of the LSHFC peoperty, construction of a major waterfowl management refuge, and access to the management area by the public. The FWS went to great effort on page 20 to discredit the WBR, even though the construction of WBR is more likely to occur than the collapse of the LSHFC. It is not understood how this easement will stop the predicted conditions from occurring.

Page 23, Paragraph 3. The FWS neglected to mention several significant rights that the club retained, like mineral exploration, drilling, and mining.

Page 24, Last Paragraph, second sentence. This sentence which states, "If the FWS does not accept the donation of the easement, it will fail to meet its international obligations specified in the *North American Waterfowl Man-*

agement Plan, Migratory Bird Treaty Act, and Migratory Bird Conservation Act" may be a little overstated.

Page 26, "AFFECTED ENVIRONMENT. Section 1502.15 "Affected Environment" of the NEPA Regulations states:

> § 1502.15 Affected environment
>
> The environmental impact statement shall succintly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

This is not an EIS, but it is in the EIS format. This 18-page generic discussion does not succintly describe the environment of the area to be affected or created. It does not describe the LSHFC wildlife and waterfowl habitat, it does not describe vegetation types or acres or wetlands within the LSHFC. It does not describe the LSHFC waterfowl management and timber flooding. The LSHFC apparently floods timber during the waterfowl hunting season, but it is not known whether the flooded timber is drained after the season. It does not say how many and what kinds of ducks are shot. It does not say how many and what kinds of waterfowl over-winter in the LSHFC; it does not give any habitat values based on the FWS's Habitat Evaluation Procedures; it does not give any indication of deer and other wildlife population; it does not describe existing mineral rights, but there is no mention

of whether oil, gas, lignite, etc., is likely to be found in the wetland area. It does not describe projected future population and industrial growth and associated water needs; it does not .... In summary, it more accurately fits the "verbose description" category of Section 1502.15.

This section does use words like "diverse, numerous, greater, most important, key role, sustaining continental, etc.

Page 44, IV. Environmental Consequences.

NEPA Section 1508.8 "Effects" states, "Effects includes .... economic, social, or health whether direct, indirect, or cumulative." Section 1508.14 "Human Environment" states, "Human Environment shall be interpreted comprehensively to include the natural and physical environment in relationship of people with that environment (See the definition of "effects" (§ 1508.8)) .... When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment. Section 1502.16 "Environmental Consequences" states, ".... It shall include discussions of: ... (c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local ... land use plans, policies, and controls for the area concerned ... (g) Urban quality, historic and cultural resources, and the design of the built environment ...."

This section restricts itself to the LSHFC area and ignores the major points of controversy and concern—WBR and future water needs and requirements and the possible threat to other Texas reservoir development.

Page 47, V RELATIONSHIP OF SHORT-TERM AND LONG-TERM PRODUCTIVITY. See previous comment for page 44, Environmental Consequence.

Page 50

First Paragraph, Last Sentence. "The possibility of this easement donation setting a precedent that could cause other reservoir projects to be stopped has been evaluated and is also discussed in this final EA." The locations of these evaluations and discussions are not apparent.

Last paragraph. The FWS seems to be confused on its coordination with the Bureau. The FWS prepared a response dated October 9, 1986, to the Bureau's comments on the LSHFC draft environmental statement dated September 29, 1986. This response stated:

> Coordination between Fish and Wildlife Service (FWS) and Bureau of Reclamation (BR) began on September 15, 1985. On that day, Jim Neal and J.E.B. Stuart of FWS met with Emmett Gloyna and Fred Ore at BR's office in Austin, Texas. At that meeting, a copy of FWS's draft concept plan was given to BR. Discussion at that meeting indicated that none of the priority one bottomland hardwood sites identified in FWS's concept plan were in conflict with any of BR's priority one water development sites. Since that original coordination meeting between FWS and BR, there has been infrequent contact between FWS's Ecological Services Field Office in Ft. Worth, Texas, and BR.

On October 23, 1986, the Bureau made the following response to this comment:

> By your subject memorandum, you stated that coordination between the FWS and Bureau began with a meeting in our Austin office on September 15, 1985, and that coordination meetings had been infrequent since the original coordination meeting. We attempted to verify this meeting with our Austin office. The Austin office advises that

there is no record of a meeting with the FWS on Sunday, September 15, 1985. They do have a record of a February 15, 1985, meeting with the FWS. At that time the overall Texas Bottomland Hardwood Program was discussed. Copies of the materials received at that time are included with this memorandum for your information. There is no reference in this material to the Little Sandy Hunting and Fishing Club (LSHFC) easement. Likewise, the LSHFC easement was not discussed at the February 15 meeting or any subsequent meetings. We cannot agree with your position that coordination meetings were held with us regarding the proposed LSHFC easement.

Early in 1986, a biologist for the Texas Parks and Wildlife Department made us aware of the FWS May 1984 report titled *Texas Bottomland Hardwood Preservation Program, Category 3.* Upon request, we received a copy of this report from the FWS. We reviewed this report and had no serious concern for the nonspecific 14,000-acre Middle Sabine Bottom as presented on pages 168 and 169. We now know that Item 10, "Concern: Large green-tree reservoirs in hunting club within the project area" is probably the 3,802 acres of LSHFC property included in your proposed easement.

The FWS now states "The Bureau of Reclamation was briefed on the Texas Bottomland Hardwood Protection Project on February 15, 1985. In the fall of 1985, the Little Sandy Hunting and Fishing Club was discussed as one of a number of possible mitigation sites for the Big Sandy project." A discussion with the Bureau about the use of the LSHFC as a possible mitigation site for the Big Sandy project can hardly be considered as coordination for this easement donation; however, it might be possible

that the river authority would consider discussing the use of this easement to satisfy mitigation for Big Sandy.

Page 53. This page says that the environmental impacts from this action will not be significant. What about the social and economic part of the Human Environment? Section 1508.8 "Effects," 1508.14 "Human Environment," and 1508.27 "Significantly" of the NEPA Regulations." On page 49 it is stated that 66 speakers gave oral comments (43 spoke in favor and 23 against and 3 noncommittal). There is no indication of letters numbers. This type of reaction to a "non-impact" action seems excessive. Also, since none of the letters or comments are included in Section VII CONSULTATION AND COORDINATION, there is no way for the reader to tell if there is "significance" conceived by the concerned people and agencies. Certainly there must have been considerable controversy over the possible loss of the WBR and the ability of the river authority to meet future water needs. There must also have been considerable concern expressed over the precedent that this easement will set in relation to additional losses of other reservoir sites if the FWS continues to acquire bottomlands as described in the "Texas Bottomland Hardwood Protection Program."

In conclusion, I would not want to defend this EA in court as an expert witness, but it might be fun to be an expert witness for the other side.

/s/ Richard E. Bass

APPENDIX F

PART 1508—TERMINOLOGY AND INDEX

Sec.

1508.1 Terminology.
1508.2 Act.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
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1508.8 Effects.
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1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C.

7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for leg-

islation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures,

and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment). § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by sec. 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary,

or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control

over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.10 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal

and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) Indirect; (3) cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long- term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened specifies or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Supreme Court, U.S.
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No. 91-1927 (3)
No. 91-1929 (2)

In The

Supreme Court of the United States

October Term, 1991

Sabine River Authority and
Texas Water Conservation Association

Petitioners

v.

United States Department of Interior, et al.

Respondents

On Petitions for Writs of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT, LITTLE SANDY HUNTING AND FISHING CLUB, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal action in accepting a purely negative easement, which neither causes nor permits any change in the physical environment, is a major action significantly affecting the quality of the human environment, requiring the preparation of an Environmental Impact Statement.

2. Whether the FWS Preservation Program is a proposal for major federal action (rather than a general guide for future activity) of such a nature as to require an Environmental Impact Statement.

PARTIES

Although not included in the "Parties in the Court Below" section in the Sabine River Authority Petition, Little Sandy Hunting and Fishing Club, correctly listed as an "Interested Party" in the Texas Water Conservation Association Petition, was a defendant in the District Court, an appellee in the Court of Appeals, and is a respondent here. It has neither parent nor subsidiary.

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BRIEF OF RESPONDENT, LITTLE SANDY HUNTING AND FISHING CLUB, IN OPPOSITION

STATEMENT OF THE CASE

In 1986 Little Sandy Hunting and Fishing Club granted the United States of America a perpetual non-development negative easement

covering 2800 acres in Wood County, Texas. The only thrust of the easement was to preserve the land in the character then existing. It restricted the fee owner by prohibiting alteration of typography or vegetative cover, drainage of wetlands, any development, ranching or cattle operations, timber cutting or harvesting and unnecessary roads, trails or fences. It granted the Fish and Wildlife Service no affirmative rights. All FWS can do is come on the land and see that the restrictions are observed and conservation practices continued. There is no right granted to "use" the land for any purpose. The acceptance of the easement came after the preparation of an Environmental Assessment and the issuance of a Finding of No Significant Impact.

Sabine River Authority was concerned that its proposed Waters Bluff Reservoir, designed to meet water needs in the year 2030, could not be built, although at this stage there had been no

final decision to proceed, no license or permits obtained, and no funds were available. It nevertheless filed suit, contending that under NEPA an EIS was required in connection with the acceptance of the easement.

Texas Water Conservation Association was allowed to intervene and raised a new issue not introduced (but now adopted) by Sabine River Authority, namely that FWS's Concept Plan, pertaining to future acquisition of wildlife refuge sites, was major federal action requiring an EIS.

REASONS FOR DENYING THE PETITIONS

There is no express contention that there is conflict between the decision below of the Fifth Circuit and a decision of another United States Court of Appeals, nor that the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Furthermore, the decision below is clearly correct in that it tracks leading decisions of this Court, namely:

1) Metropolitan Edison v. People against Nuclear Energy, 460 U.S. 766 (1983), in holding that federal action having no effect on the physical environment requires no EIS; and

2) Lujan v. National Wildlife Federation, 497 U.S. -- 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990), in holding that Bureau of Land Management's land withdrawal review program did not require an EIS.

ARGUMENT[1]

I. THE ACCEPTANCE OF THE LITTLE SANDY EASEMENT DID NOT REQUIRE THE PREPARATION OF AN EIS

The question at the heart of this case is whether the acceptance of the Little Sandy easement was " . . . major Federal action significantly affecting the quality of the human environment . . . "

Aside from whether the action was "major" or "significant," did it affect the human environment? It gave FWS no affirmative rights to do anything; it put serious restrictions on Little Sandy. The FWS goal was to maintain everything, as far as it possibly could, as it existed -- change nothing.

Could such an easement "significantly affect the quality of the human environment?" That depends on what Congress meant by "human

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[1]Since both Petitions present the same two issues, they will be addressed jointly in this brief.

environment." How expansive is that concept? The Supreme Court in Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766, came to grips with this question and gave a clear answer. It said:

> "If we were to seize the word "environment" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequences of a governmental action that someone thought "adverse." But we think the context of the statute shows that Congress was talking about the physical environment -- the world around us, so to speak. NEPA was designed to promote the human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment." 460 U.S. at p. 772.

and again:

> "Thus, although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment, 460 U.S. at p. 773, (emphasis by the Court)."

So, does the acceptance of this easement, that is designed to continue in perpetuity the character of this land, within the framework of

the easement provisions, adversely affect the physical environment? To ask the question is to answer it. So far as FWS is concerned, there will be no changes whatsoever in the environment. The land and waters conserved by the easement will continue, peaceful, serene, and undisturbed, as they have for decades. Even as to the fee owner, Little Sandy, there are serious restrictions on what it can do that might alter the condition or use of the land. And there is no change of any nature because none of the prohibited uses is going on now. In no way does the granting of the easement produce, cause, or result in a change or invasion of the environment. Literally, nothing happens or comes to pass as a consequence of the easement. The threshold requirement of a primary impact on the physical environment is missing.

The Authority and Texas Water Conservation Association (TWCA) have recognized, as they must, that an adverse effect upon the physical

environment is necessary to generate a requirement for an EIS, but they immediately shift the talk to human environment and decry the consequences that will ensue if a scarcity of water develops (meaning Waters Bluff is not built) and the economy and the people suffer from the scarcity of water.

But how is not building a reservoir an adverse effect upon the physical environment? It may be something else -- it may have other consequences, but it is not a physical change in the environment.

There is no doubt as to what Congress had in mind. Two principal sponsors of NEPA explained:

> "What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: that we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth." 115 Cong Rec 40416 (remarks of Sen. Jackson) (emphasis supplied).

> "[W]e can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment." Id. at 40924 (remarks of Rep. Dingell) (emphasis supplied).

". . . irreparable damage to air, land, and water . . . " How is the air -- or the land -- or water -- damaged by the acceptance of the easement?

Petitioners recognize that they must deal with Metropolitan Edison and manfully attempt to do so, but they constantly encounter the problem of identifying the change in physical environment, resulting from federal action, that is necessary. No matter how they twist and turn, they cannot avoid the fact that Congress, in enacting NEPA, chose to protect the human environment by monitoring the effects of changes in the physical environment.

What Petitioners seek is a different statute -- an enhanced NEPA -- a statute that Congress could have enacted but did not -- a

statute that says that any federal action that may have an effect on the human environment (even though no effect on the physical environment) requires an EIS.

Petitioners say the courts below preferred "preservation actions" to water supply. These courts did nothing of the sort. They merely followed the clear decision of this Court -- to involve NEPA, federal action must change or lead to a change in the physical environment.

It is a one-two-three analysis -- First, a federal action that, secondly, changes the physical environment, producing, thirdly, an effect on the human environment that should be evaluated.

Here the second criterion is missing. There is simply no effect on the physical environment from the acceptance of the easement.

It is this second essential that Petitioners ignore or glide over.

To give just one example -- the Authority says in its Petition (page 11):

> "The ruling below wholly excludes from NEPA, preservation actions which themselves cause no immediate changes in the physical environment. This is so, even where such actions preclude human intervention necessary to protect other important environmental interests -- such as, in this case, a plentiful clean water supply for human consumption."

The Authority sets forth the first criterion -- federal action, jumps over the "no change" requirement, and emphasizes the adverse effect on human health and welfare.

Suppose, for instance, that FWS had owned the land in question, in fee simple, from time immemorial, and the Authority sought to buy the land to build Waters Bluff/Reservoir. Would FWS have to prepare an EIS in order to decline to sell? Obviously not, yet such action would have all the dire consequences that the Petitioners say will result from acceptance of the easement. On the other hand, if FWS decided to sell to allow the building of the lake, it probably would have to prepare an EIS, to evaluate the consequences. One of the judges commented on this point in the course of the Argument before

the Fifth Circuit panel and the Court in its opinion stated:

> "Of course, when the government conveys property to, or exchanges land with, a private party that plans to develop the land, an EIS is necessary because the conveyance of property is precipitating a change in the physical complexion of the land." (SRA Appendix A, p.21a) (emphasis by the Court).

The Authority attempts to support its position by invoking the "risk" section in Metropolitan Edison. It points to the situations where leases, licenses, etc. from the federal government become subject to NEPA because they create a "risk" that subsequent action may damage the physical environment. Exactly so. Such licenses, etc. lead to constructing dams, building airports, dredging wetlands, etc. The one-two-three step is satisfied: federal action -- environmental change -- damage to air, land, or water (the human environment). That can never happen in the instant case. There can be no "risk" of

later action affecting adversely the environment because the easement permits no action.

In deciding this case, the District Court went into an extensive review of the record which had been compiled in this case. The Fifth Circuit on appeal, because the case had been decided on summary judgment motions, reviewed the record (SRA Appendix A, pp. 18a-19a) and affirmed. Now Petitioners, presenting an Appendix D of 154 pages of affidavits, interrogatory excerpts and letters ask this Court to conduct a third review of factual matter. We urge the Court to decline this request.

II. THE FWS PRESERVATION PROGRAM DOES NOT RISE TO THE STATURE OF MAJOR FEDERAL ACTION REQUIRING AN EIS

The record in this respect is very extensive and complex. Petitioners point to certain circumstances as indicating the development of plans, analysis of alternatives, and establishment of goals to such a degree as to culminate in a proposal for action that would

require NEPA review. They ignore the fact the Plan was a preliminary study, which refused to specify sites to acquire, and left open a wide avenue of approaches to accomplish its goal of preserving bottomland habitat. It refers to the infancy of the program and the future preparation of a detailed preservation plan.

Furthermore, the very nature of the Program assumes that acquisition of conservation easements and titles will not lead to changes in the environment and thus involve NEPA. TWCA in its brief (p. 19) refers to the Program as ". . . a program of Federal acquisition for perpetual nondevelopment of water resource areas . . ." (emphasis supplied).

Finally, we deal here with a situation where the district judge has carefully reviewed the extensive record and concluded that ". . . the Court finds the Preservation Program is not a 'proposal' for major federal action under NEPA." (SRA Appendix A, p. 50a).

The Court of Appeals has affirmed, saying:

> "the district court correctly dismissed the claims brought by the Sabine River Authority and the Texas Water Conservation Association and we are hard-pressed to improve upon its scholarly work." (SRA Appendix A, p. 3a).

The holding below on the factual analysis of the situation brings us within the ambit of this Court's recent opinion in Lujan v. National Wildlife Federation, 497 U.S. ____. There the question was whether a land withdrawal review program was "agency action" within the meaning of the Act. The court said (111 L.Ed.2d at p. 717):

> "It is impossible that the affidavits would suffice, as the Court of Appeals held, to enable respondent to challenge the entirety of petitioners' so-called "land withdrawal review program." This is not an "agency action" within the meaning of §702, much less a "final agency action" within the meaning of §704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly

> changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action" -- much less a "final agency action" -- than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations. 699 F.Supp., at 332."

In brief, the Program is not ripe for NEPA-EIS consideration. Again, we urge the Court to decline the opportunity to examine a factually complex record, already fully reviewed below.

CONCLUSION

For the reasons stated, we urge denial of the Petitions.

Respectfully submitted,

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Nos. 91-1927 and 91-1929

In the Supreme Court of the United States

OCTOBER TERM, 1992

TEXAS WATER CONSERVATION ASSOCIATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

SABINE RIVER AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an environmental assessment prepared by the United States Fish and Wildlife Service in conjunction with its decision to accept a donated non-development easement to preserve a bottomland hardwood waterfowl habitat properly concluded that a full environmental impact statement was not required because the acceptance of an easement to preserve the existing physical environment would not "significantly affec[t] the quality of the human environment" within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether documents generally identifying regional bottomland hardwood sites and outlining possible methods for their preservation constituted "proposals for * * * major Federal actions" subject to the environmental impact assessment provisions of Section 102(2)(C) of the Act.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (SRA Pet. App. 1a-23a) is reported at 951 F.2d 669. The opinion of the district court (SRA Pet. App. 24a-54a) is reported at 745 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. A petition for rehearing was denied on

March 4, 1992 (SRA Pet. App. 55a-56a). The petition for a writ of certiorari was filed on June 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires that every federal agency include a detailed statement of environmental consequences (known as an environmental impact statement or EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C); SRA Pet. App. 58a-59a. The agency's responsibility to prepare an EIS is keyed to its making a "recommendation or report" on an actual "*proposal* for federal action," not merely "the contemplation of a project and the accompanying study thereof." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976) (emphasis in original), quoting *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 320 (1975).

Because it is not always clear from the start whether a proposed federal action will "significantly affec[t] the quality of the human environment" within the meaning of the statute, the Council on Environmental Quality established by NEPA (42 U.S.C. 4341 *et seq.*) has issued regulations (40 C.F.R. 1500.1 *et seq.*) under which an agency may first prepare an "environmental assessment," a "concise" document that will "[b]riefly provide sufficient evidence and analysis for determining whether to prepare" an EIS and "[a]id an agency's compliance with [NEPA] when no [EIS] is necessary." 40 C.F.R. 1508.4(b), 1508.9; see SRA Pet. App. 88a. If, based on the environmental assessment, the agency determines that a full EIS is not required, it will issue a "finding of no

significant impact" (FONSI) to that effect. 40 C.F.R. 1501.4(e).

2. a. Congress has directed the Secretary of the Interior to acquire interests in wetlands in order to conserve migratory waterfowl. See, *e.g.*, Migratory Bird Conservation Act, ch. 257, 45 Stat. 1222, 16 U.S.C. 715 *et seq.*; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd-668ee; Migratory Bird Hunting Stamp Act, ch. 71, 48 Stat. 452, 16 U.S.C. 718 *et seq.*; Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582, 16 U.S.C. 3901 *et seq.* See generally *North Dakota* v. *United States*, 460 U.S. 300 (1983). Lands acquired pursuant to these directives are administered by the United States Fish and Wildlife Service (FWS) as components of the National Wildlife Refuge System. 16 U.S.C. 668dd.

The FWS has implemented a Migratory Bird Program that includes the preparation of regional studies describing and identifying migratory bird habitats. In 1983, an FWS biological survey identified as particularly valuable waterfowl habitats certain bottomland hardwood areas in eastern Texas, including land owned by the private Little Sandy Hunting and Fishing Club (Club) (SRA Pet. App. 41a; A.R. Item A, Sec. IV, at 1-6). The FWS compiled the survey results and other available information into a document (A.R. Item B) titled "Concept Plan: Texas Bottomland Hardwood Preservation Program Plan," issued in final form in May 1985.

The Concept Plan was intended to "identify and seek methods for preserving" bottomland sites (A.R. Item B, at 4), but noted that "[a] stated acreage and policy objective for bottomlands in Texas is very difficult because of the infancy of the program and complexity of biological and sociological factors involved." *Id.* at 20. It ranked identified sites into six preliminary priority categories, the highest of which included the Middle Sabine River

Bottom where the Club lands are located, *id.* at 23, but stated that "[n]o specific sites are presently targeted for action, and additional sites may be added to the list at a future date." *Id.* at 11. At the time, "[a] minimal amount of landowner information ha[d] been acquired." *Id.* at 22.

In January 1986 the FWS issued a regional "Land Protection Plan" (LPP) covering bottomland hardwoods in Texas and Oklahoma. A.R. Item C. The LPP stated that the FWS "propose[d] to identify the minimum level of protection necessary to preserve as much as possible of the remaining high quality bottomland habitat," and reviewed "a combination of alternative actions" to that end. *Id.* at 1-2. It projected a goal of preserving some 250,000 acres identified as important habitat in the two States, but did not speculate as to which sites would be protected. *Id.* at 5-6.

b. Section 16.051 of the Texas Water Code directs state agencies to prepare comprehensive water plans for the development and management of the State's water resources. Tex. Water Code Ann. § 16.051 (Vernon 1988). In 1984, the Texas Water Development Board published a revised Texas Water Plan (TWP) (A.R. Item H) setting forth water planning through 2030. The 1984 TWP mentioned four potential reservoirs along the Middle Sabine River, but none within the immediate area of the Club's property. The TWP projected a surplus of water in the Sabine Basin through 2030. A.R. Item H, Vol. II, at III-5-11, III-5-15 & Fig. III-5-3.

In March-April 1985, petitioner Sabine River Authority (SRA) issued a report (A.R. Item N) extending its own "master plan" through 2030. The report included a summary of preliminary design studies for a "totally new project" to build a Waters Bluff Reservoir that would, if constructed, inundate the Club's property. *Id.* at 10-1 *et seq.* In March 1986, SRA completed a preliminary feasibility study on Waters Bluff (A.R. Item M),

which recommended continued efforts to proceed with the project subject to cost and other possible (including environmental) constraints. *Id.* at 14-2, 9-8.

c. From 1982 through 1986 the FWS, the Texas Parks and Wildlife Department, the Club and others (including petitioner SRA) had discussed protection of waterfowl habitat on the Club's prime bottomland property along the Sabine River. Gov't C.A. Br. 10-11 & n.17. On August 29, 1986, the Club offered to donate a nondevelopment easement on the property to the United States for inclusion within the National Wildlife Refuge System. *Ibid.*

Faced with a proposed acquisition, on September 8, 1986, the FWS issued for comment a draft environmental assessment (A.R. Item P), tentatively concluding that no EIS was required under NEPA because the acceptance would not significantly affect the quality of the human environment. After public hearings and receipt and consideration of comments, in December 1986 the FWS issued a final environmental assessment (EA) and FONSI (A.R. Item D) and accepted the easement.

The EA discussed the potential impact of the proposed acquisition upon future water supplies, addressed SRA's preliminary plans concerning the Waters Bluff Reservoir and evaluated alternative proposals. It concluded both that elimination of the Waters Bluff site would not seriously impair the availability of water supplies for the foreseeable future and that establishing a waterfowl refuge in conjunction with the proposed Waters Bluff project was not a desirable alternative to accepting the easement. A.R. Item D, at 11-17, 20-21. It emphasized that acceptance of the easement would preserve, rather than altering or allowing future alteration of, the area's environmental characteristics. *Id.* at 44-46.

3. a. Petitioner SRA brought suit challenging the FWS's decision to accept the donated easement without

first preparing an EIS. Petitioner Texas Water Conservation Association (TWCA) intervened as a plaintiff, supporting SRA's arguments and also alleging that FWS was required to prepare an EIS with respect to the overall bottomlands preservation "program" outlined in the Concept Plan and the LPP.

The district court granted summary judgment for the defendants. The court ruled that SRA and TWCA lacked standing to maintain their NEPA claims (SRA Pet. App. 39a, 40a, 53a). The court also addressed the merits, however, and on the basis of the administrative record upheld the FONSI that accompanied the final EA. The court held that the FWS had taken an appropriately "hard look" at the environmental consequences of its actions and adequately considered the information before it, *id.* at 40a-49a, and that NEPA did not require the FWS to give further consideration to the harms alleged by petitioners (the inability to develop the Club site as a reservoir and the risk of future water shortages) because they did not follow from any "changes in the physical environment cause[d]" by the FWS's action. *Id.* at 33a.

The court likewise rejected (SRA Pet. App. 50a-52a) TWCA's claim that the preservation "program" set out in the Concept Plan required an EIS. The court found that the Concept Plan was a study and planning document, without "effects" that could be meaningfully evaluated, and thus did not constitute a "proposal" for major federal action subject to NEPA. *Id.* at 52a.

b. The court of appeals reversed the district court's decision on standing (SRA Pet. App. 7a-13a), but otherwise upheld and generally adopted (*id.* at 3a) the district court's rulings and opinion on the merits. Citing the district court's "painstaking review of the agency record" (*id.* at 19a), the court agreed that the FWS's decision not to prepare a full EIS was not arbitrary or capricious.

The court held (*id.* at 20a-22a) that preservation of the Club property would cause no physical change in the environment, and thus would have no significant environmental impact of the sort with which NEPA is concerned.

ARGUMENT

1. As the court of appeals recognized, judicial review of an agency's finding of no significant impact (*i.e.*, its determination that an EIS is not required with respect to a proposed action) is highly deferential. SRA Pet. App. 15a-18a and cases there cited; see *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-378 & n.23 (1989). Whether the exact standard is the "arbitrary and capricious" standard applied by the court of appeals, SRA Pet. App. 16a, or the "reasonableness" standard applied by the district court, SRA Pet. App. 27a, is unimportant in this case. This Court has recognized that the difference generally "is not of great pragmatic consequence." 490 U.S. at 377 n.23. Moreover, the court of appeals explicitly held (SRA Pet. App. 17a n.2) that it would have affirmed the district court's decision even under the more demanding standard.

The district court carefully reviewed (SRA Pet. App. 40a-49a) the procedural and substantive adequacy of the FWS's environmental assessment of accepting the Club easement. It concluded that while petitioners might disagree with the FWS's decision, there was "no indication that the FWS failed to consider pertinent data in reaching its conclusion," that its review was inadequate, or that its decision was unreasonable, arbitrary or capricious.[1] *Id.* at 42a. Acknowledging the district court's

[1] Petitioner TWCA suggests (TWCA Pet. 30) that FWS "ignored" the comments of the various federal and state agencies which expressed water supply concerns when FWS circulated the draft EA for comments. As the district court noted (SRA Pet.

"painstaking review of the agency record," the court of appeals agreed. *Id.* at 19a. Thus, two federal courts have reviewed the FWS's administrative findings and upheld its decision on the particular facts of record under a proper and essentially undisputed legal standard. The question does not merit further review.

2. Petitioner SRA's assertion (SRA Pet. 6) that the decision "creates an unprecedented blanket exemption from NEPA's mandate" is unfounded. This Court has held that NEPA does not require an EIS to address possible consequences of agency actions unless there is "a reasonably close causal relationship" between the alleged harm and a "change in the physical environment" caused by the agency action. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).[2] SRA is correct (SRA Pet. 18-21) that under NEPA an agency must take account of unexpected but potential physical environmental changes (*i.e.*, environmental risks) flowing directly from its actions, such as the risk of an accident incidental to operating a nuclear power plant, 460 U.S. at 775 & n.9, but no such risk has ever been identified in this case. The risk that SRA and TWCA complain of—potential future water shortages—

App. 44a-45a), however, the FWS considered those comments and subsequently revised and expanded the final EA with a responsive discussion of the water supply situation, including the Waters Bluff project.

[2] In its attempt to distinguish *Metropolitan Edison* (SRA Pet. 14-18), SRA appears to argue that that decision somehow requires a connection between the effect of an agency action and the physical environment, without requiring a connection between the federal action and a physical environmental change. Even if this were logically possible, the Court's opinion states clearly that NEPA "was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment" and "addresses environmental effects of federal actions." 460 U.S. at 772, 778.

would arise not from the FWS's action in accepting the preservation easement, but from completely exogenous factors (such as population increases or changes in the uses of surrounding land) and the potential inability of other authorities to take a particular action they might otherwise have taken at some point in the future.[3] See SRA Pet. App. 33a-34a. Importation of such factors into the analysis "lengthens the causal chain beyond the reach of NEPA." 460 U.S. at 775.

The courts of appeals have consistently held that NEPA does not require preparation of an EIS when an agency's action does not result in any change to the physical environment as it exists at the time of the action. *E.g.*, *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1001-1003 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980) (lease of existing parking lot to new manager); *Sierra Club* v. *Hassell*, 636 F.2d 1095, 1098-1099 (5th Cir. 1981) (replacement of bridge destroyed by hurricane); *Upper Snake River Chapter of Trout Unlimited* v. *Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) (significant adjustment of dam flow rate as part of normal management); *Burbank Anti-Noise Group* v. *Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981) (financial assistance to purchase existing airport).[4] Applying this principle to the facts,

[3] Where, as here, the agency's action merely maintains the environmental status quo, the ability of Congress (if not of local authorities) to address any conflicting needs that actually arise in the future is of course preserved. See SRA Pet. App. 36a; A.R. Item D, at 46, 53.

[4] Cases such as *Lockhart* v. *Kenops*, 927 F.2d 1028, 1032-1033 (8th Cir.), cert. denied, 112 S. Ct. 186 (1991) (see SRA Pet. 16 & n.10, TWCA Pet. 47 & n.15), holding that particular title transfers required preparation of an EIS, are not to the contrary. As the court of appeals pointed out (SRA Pet. App. 21a), such cases involve situations where, unlike here, title is transferred in contemplation of physical changes to the land. The cases cited by

the courts below correctly concluded (SRA Pet. App. 21a-22a, 32a-35a) that the FWS's acquisition of a preservation easement the very purpose of which was to *prevent* changes in the environmental status quo was not the sort of action that NEPA was intended to reach.

SRA contends (SRA Pet. 7-9) that the decision below conflicts with the principle of statutory neutrality enunciated by *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Contrary to SRA's suggestion (SRA Pet. 8), however, the court of appeals did not conclude that no EIS was required because FWS's action "as a whole [was] environmentally beneficial" or import into NEPA a blanket exception for agency actions in furtherance of "preservation interests." The court merely applied the established rule that no EIS is required where the federal action in question will not affect the existing physical environment. The court of appeals expressly noted that NEPA "does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after tak-

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petitioner TWCA (*e.g.*, TWCA Pet. 48-49, 58-59) are similarly compatible with the status quo principle. *Forelaws on Board* v. *Johnson*, 743 F.2d 677, 681-682 (9th Cir. 1985), cert. denied, 478 U.S. 1004 (1986), for example, carefully contrasted the situation where discretionary agency decisions would affect future power needs and therefore the need for resource development (EIS required) with agency decisions merely allocating or reallocating an existing, fixed supply of power (no EIS required). *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), required an EIS where changes in allocation of water from existing reservoirs involved direct and undisputed physical environmental changes (reducing "return flow" of water to rivers). *Id.* at 851; see SRA Pet. App. 34a (district court opinion).

ing a 'hard look at environmental consequences.'" SRA Pet. App. 13a, quoting *Methow Valley*, 490 U.S. at 350.[5]

The FWS and the courts below agreed in applying settled legal principles to straightforward facts. They correctly concluded that "NEPA does not require a federal agency to prepare an EIS in order 'to leave nature alone.' NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is *not* built." SRA Pet. App. 19a-20a (citation omitted) (court of appeals), quoting TWCA Pet. App. A65-A66 (district court), quoting *National Ass'n of Property Owners* v. *United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), aff'd *sub nom. Minnesota* v. *Block*, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982). That common sense conclusion requires no further review by this Court.

3. TWCA contends (TWCA Pet. 19-39) that the FWS was obligated to prepare a "programmatic" EIS in conjunction with the Concept Plan and the regional LPP. An EIS is required, however, only at "the time at which [the agency] makes a recommendation or report on a *proposal* for federal action." *Kleppe* v. *Sierra Club*, 427

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[5] SRA's complaint (SRA Pet. 9-13) that the decision below will allow the FWS to proceed without consideration of water supply issues ignores the preliminary environmental assessment procedure. The EA prepared in this case considered (A.R. Item D, at 11-17) the potential impacts of the easement acquisition upon future water supplies and determined, as a factual matter, that acceptance of the easement would not have any significant impacts upon water supplies in the foreseeable future. Even if the easement would preclude the construction of a Waters Bluff Reservoir, the EA concluded (*id.* at 15-16) that foreseeable water supply demands could be readily satisfied from other existing and proposed reservoirs. The district court specifically found the EA's consideration of this question to be fully adequate. SRA Pet. App. 42a. The court of appeals endorsed (*id.* at 22a) the district court's finding.

U.S. at 406 (emphasis in original), quoting *Aberdeen & Rockfish R.R.*, 422 U.S. at 320. The Council on Environmental Quality's regulations state in relevant part that a "proposal"

> exists at that stage in the development of an action when an agency subject to [NEPA] has a goal *and is actively preparing to make a decision on one or more alternative means of accomplishing that goal* and the effects can be meaningfully evaluated.

40 C.F.R. 1508.23 (SRA Pet. App. 92a-93a) (emphasis added). Neither the Concept Plan nor the LPP met this definition.

The district court (SRA Pet. App. 50a) expressly applied Section 1508.23 and concluded that the Concept Plan did not constitute a "proposal." The court found (*ibid.*) that "a plain reading of the Concept Plan demonstrates that it is nothing more than a preliminary study document that the FWS intends to use as a basis for making specific proposals for land acquisitions in the future." The court then stated:

> The FWS's guidelines concerning land acquisitions explain that a concept plan such as the one prepared for the Preservation Program is only a preliminary step in the FWS's decision making process concerning land acquisitions. * * * Even after a concept plan is prepared, land acquisitions may be rejected after the FWS conducts further study and planning. It is only after such further study and planning that the FWS prepares a "decision document" concerning a specific proposal for land acquisition, and the guidelines provide that such decision documents shall be prepared in accordance with NEPA. Thus, the Preservation Program Concept Plan is not a "proposal" under NEPA, and the statements con-

tained in the Preservation Program Concept Plan support this conclusion.

SRA Pet. App. 51a (citations omitted).

TWCA disputes (TWCA Pet. 24-32) the district court's weighing of the evidence, but the court clearly had adequate grounds in the record for its finding that the Concept Plan did not constitute a "proposal" for the purposes of NEPA. Cf. *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3189-3191 (1990) (Bureau of Land Management's "land withdrawal review program" not sufficiently defined to be reviewable agency "action"). Moreover, even if the Concept Plan had constituted a "proposal," it would have been largely a proposal to acquire preservation easements of the sort at issue in this case, directed at preventing rather than causing or allowing changes in the physical environment. For the reasons discussed above, such a proposal would not have required an EIS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SABINE RIVER AUTHORITY, *et al.*
Petitioners,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY OF PETITIONER TO RESPONDENTS' BRIEFS IN OPPOSITION

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BACKGROUND

Early in 1985, Petitioner, the Sabine River Authority (the "Authority"), publicly announced its intention to construct the Waters Bluff Reservoir ("Waters Bluff") along the Sabine River in Texas. Upon learning of the Authority's intentions, the Little Sandy Hunting and Fishing Club (the "Club"), owner of property that would have been subject to condemnation in building Waters Bluff, donated to the United States Fish & Wildlife Service ("FWS") a perpetual conservation easement over its property. Believing acquisition of the easement was subject to the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321, FWS prepared an Environmental Assessment ("EA"). The EA concluded that the agency's action would not significantly affect the quality of the human environment. FWS deposited its acquired easement in the National Wildlife Refuge System thereby foreclosing the development of Waters Bluff.

ARGUMENT

The petition before this Court raises a simple question: Can the creation of a federal refuge ever warrant preparation of an environmental impact statement ("EIS") under NEPA? By answering this question in the negative, the lower courts have effectively exempted FWS's action and all other preservation actions from NEPA. (*See* Fifth Cir. Opinion, App. A at 22a (Where "land is earmarked as a wildlife habitat and migratory bird refuge . . . this intended 'use' . . . has no significant environmental impact.")).

The Government argues that the Authority has overstated the effect of the lower court rulings. (Fed. Defs. Opp. at 8). It points to the EA prepared by FWS as evidence that preservation actions *per se* do not fall outside the parameters of NEPA. (Fed. Defs. Opp. at 11, n.5). Yet the rulings below extend much further than the Government is willing to admit. The plain holding below is that a pure preservation action, such as where "land is earmarked as a wildlife habitat and migratory bird refuge" by definition will never impact environmental concerns for purposes of NEPA. (App. A at 22a). This holding creates by fiat a categorical exclusion to NEPA for preservation acquisitions of the type taken by FWS here. There can be no doubt that more acquisitions will take place in the future, in Texas and elsewhere across the nation. The decisions below exempt future similar acquisitions from NEPA thereby allowing such acquisitions to proceed unbeknownst to the general public and without input from other interested parties. While an EA was prepared in this case, the holdings below do not even ensure this minimum level of NEPA review.

The government continues, as it has in the past, to argue that the EA was properly considered and upheld by the lower courts. The decisions below, however, turn on the threshold question of whether NEPA applies in any measure to pure preservation actions. Concluding that it does not, there was little reason to scrutinize the EA; thus, the lower courts did not do so.[1] The government claims that this Court need

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[1] Admittedly, the district court engaged in review of the EA. Whenever, however, it faced an unavoidable defect in the EA, it reverted to its threshold determination that since NEPA did not apply in the first instance the EA, flawed or otherwise, was

not decide whether NEPA applies to this case, because if any NEPA mandate did exist, it was discharged by the EA. (Fed. Defs. Resp. at 11 n.5). At the same time, however, the EA's flaws are excused by claiming that the EA was gratuitous because NEPA did not apply to begin with. (*See, e.g.*, App. B at 48a-49a) (FWS failure to consider controversial, precedential and cumulative effects excused because FWS's action beyond NEPA's scope anyhow). The circuity of this argument leaves no doubt as to the underlying holding of this case, namely that preservation actions, of the sort taken by FWS, are exempt from NEPA. Not only are the lower courts' rulings on the adequacy of the EA secondary, but these rulings cannot fairly be described as having been rendered independent of the court's predisposition that NEPA was inapplicable in the first instance.

The categorical exemption to NEPA created by the courts below rests on their misapplication of *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766 (1983). According to the Fifth Circuit, NEPA applies only where the federal action at issue is "proximately related to a change in the physical environment." (App. A at 21a) (citing, *Metropolitan Edison*, 103 S.Ct. at 1561). As the federal action in this case, the taking of a conservation easement, does not directly or immediately change the physical environment of the Club property, under the lower court's reading of *Metropolitan Edison*, NEPA does not apply.

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merely gratuitous. (Petition at 5). The court of appeals did not independently review the EA.

The Petition before the Court has been filed to remedy a critical misreading and misapplication of *Metropolitan Edison*. *Metropolitan Edison* does not limit NEPA's application to federal actions that themselves cause a change to the physical resources affected. The focus of *Metropolitan Edison* is not on the federal action but rather on its possible *effects* and whether these *effects* might change the physical environment. However, the character of the federal action that is the source of these effects has no bearing on NEPA's applicability.[2] It makes no difference under NEPA whether the federal action is as visceral as the lumbering of a forest or as ephemeral as the signing of report. Either will be subject to NEPA, depending on whether the potential *effects* of the action may significantly affect the quality of the environment. That is to say, whether the effects may change the physical environment.

The Authority is not seeking to distinguish *Metropolitan Edison*, as is claimed by the government (Fed. Defs. Opp. at 8 n.2), but rather to have the case correctly applied to these facts. The Authority claims that a potential effect of the government's easement acquisition is a water shortage in east Texas. As required by *Metropolitan Edison*, this ef-

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[2] The lower courts were not merely sympathetic to the environmental character of the government's easement acquisition. They were convinced that application of NEPA to a perceived pro-environmental action, such as the taking of a conservation easement, would be incongruous with the statute's purpose. (App. A at 38a.). By injecting into the NEPA process a substantive bias in favor of preservation, the decisions below are inconsistent with the "outcome neutral" application of NEPA to all major federal actions, regardless of their character. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

fect would result in change in the physical environment. The difficulty from the outset of this litigation has been the fact that the government's action - the taking of a conservation easement - does not directly or immediately change the physical environment. Based on the lower courts' reading of *Metropolitan Edison*, this fact alone has been dispositive in taking the Authority's claim beyond NEPA's reach.

The Authority additionally argues that the duty of a federal agency to consider the potential physical effects of its action, notwithstanding the non-physical character of the action itself, follows from its duty to consider environmental risks of the action. The government agrees that an agency must account for "unexpected but potential physical environmental changes (*i.e.*, environmental risks) flowing directly from its actions, such as the risk of an accident incidental to operating a nuclear power plant. . . ." (Fed. Defs. Opp. at 8) (citing *Metropolitan Edison*, 460 U.S. at 775 & n.9). But then it goes on to say that the risk of a water shortage, as identified by the Authority, would not arise from the easement acquired by the government. (Fed. Defs. Opp. at 8). This is so, despite the easement having been acquired specifically to thwart development of a reservoir designed to serve water needs. Rather, the government continues, a water shortage would be realized only if certain exogenous, intervening factors were to occur. (Fed. Defs. Opp. at 8-9).

The government's arguments as to exogenous factors are spurious. The existence of uncertain exogenous factors is what distinguishes risks from certainties. While the government concedes that risks must be evaluated, it would only have its easement

acquisition evaluated under NEPA if a water shortage was a certainty. However, NEPA does not only require evaluation of effects that are certain, but also requires evaluation of significant risks. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 100 (1983); 40 C.F.R. § 1508.27(b)(5)(The "significance" of a major federal action depends in part on "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique and unknown risks.").

The "exogenous factors" to which the government alludes, and other similar concerns, are precisely the factors it should have addressed in an EIS when acquiring the Club easement. It was plain to the government that its action would preclude a planned reservoir. It is self-evident that such action might adversely affect local water supply. An EIS should have been prepared to analyze these potential effects.

For these reasons and the reasons stated in the Authority's petition, the Authority urges the Court to rule that potential adverse environmental effects of FWS's action, particularly the risk of a water shortage should be considered under NEPA, notwithstanding the "preservation" character of the action.

CONCLUSION

The petition for a writ of certiorari should be granted.

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